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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1255

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA AND DISTRICT NO. 2, UNITED MINE WORKERS OF AMERICA, *Petitioners,*

v.

SOLAR FUEL COMPANY AND PAUL SCHRECKENGOST, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, International Union, United Mine Workers of America and District No. 2, United Mine Workers of America, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 6, 1973.

OPINIONS BELOW

The judgment of the District Court for the Western District of Pennsylvania was entered without opinion on December 16, 1971. Relevant portions of the District Court's charge to the jury are appended to this petition (Appendix A, pp. 1a-9a *infra*). The unreported opinion of the District Court denying petitioners' motion for a judgment notwithstanding the verdict or a new trial (Appendix B, pp. 10a-26a *infra*) was filed August 10, 1972. The Court of Appeals affirmed without opinion July 6, 1973, in a judgment reported at 481 F.2d 1399 (Appendix C, p. 27a *infra*).

JURISDICTION

The judgment of the Court of Appeals (Appendix C) was entered July 6, 1973, and a timely motion for rehearing *en banc* denied September 18, 1973. On December 11, 1973, Mr. Justice Brennan signed an order (A-576) extending the time during which petitioners could file this petition to and including February 15, 1974. This petition is therefore timely filed under 28 U.S.C. § 2101(c). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a labor union and employers in a multi-employer bargaining group may agree to maintain wage uniformity within the group, free of treble damage antitrust liability.

2. Whether a clause in a multi-employer labor contract, which can reasonably be interpreted to aim simply at wage uniformity within the multi-employer group, must not be construed as an illegal conspiracy against outsiders absent clear extrinsic evidence that such a conspiracy exists.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Section 1 of the Sherman Act, 26 Stat. 209, as amended 15 U.S.C. § 1, and Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 17. They are included in full in Appendix D, pp. 28a-29a *infra.*

STATEMENT OF THE CASE

This litigation arose out of a strike by employees at two coal mines operated by the Solar Fuel Company near Hooversville, Somerset County, Pennsylvania. R. 10a-11a.[1] During the strike, which lasted from July 1967 until February 1969, the United Mine Workers of America (UMWA), the certified bargaining representative of Solar Fuel's employees,[2] sought unsuccessfully to reach agreement on a contract with Solar Fuel. R. 11a, 12a.

On January 9, 1969, Solar Fuel filed suit in federal district court, claiming that the Union's conduct of the strike and negotiations violated federal antitrust laws, and also advancing a federal claim of unfair labor practices and a pendant state tort claim. R. 12a, 1149a. Jurisdiction was sought under Section 4 of the Clayton Act, 15 U.S.C. § 15, and Section 303(b) of the Labor Management Relations Act, 29 U.S.C. § 187

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[1] "R." will hereinafter refer to the Appendix for Appellants filed in the Court of Appeals below. "A." will refer to the appendices in this petition.

[2] The International Union, United Mine Workers, was certified in 1966 to represent Solar Fuel's employees. District No. 2, United Mine Workers, is a division of the union covering the Central Pennsylvania coalfields. Both the International and the District were named as defendants in the trial court, and both are petitioners herein.

(b). The subject of this petition is the ultimate judgment in favor of Solar Fuel on the antitrust claim.[3]

Solar Fuel's theory of antitrust wrong-doing amounted to a simple, two-step argument:

(1) That the Union had agreed with one group of coal operators—the Bituminous Coal Operators' Association (BCOA), whose members are signatories to the Union's national coal contract—to impose uniform terms and conditions on small, independent operators like Solar Fuel, in order to drive the latter out of business. Solar Fuel's proof of the alleged Union-employer conspiracy was limited to one item of evidence: a clause in the national coal labor agreement called the Protective Wage Clause (PWC).[4] The PWC reads in pertinent part:

> During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other

[3] The jury's antitrust judgment was for $125,000, which the court trebled to $375,000. R. 1132a, 1150a-1151a. The district court directed a verdict in favor of the UMWA on the unfair labor practice claim, while Solar Fuel was awarded an additional $45,000 in state tort damages. R. 1064a-1065a, 1133a, 1150a. Paul Schreckengost, a Solar Fuel supervisor, joined in suit with Solar Fuel, claiming damages of the same three types as those allegedly suffered by Solar Fuel. A verdict was directed against him on his unfair labor practice claim, and he was found not to have suffered any antitrust damages. R. 1064a-1065a, 1132a-1133a, 1150a. However, he was awarded $3,000 on his state tort claim. R. 1133a, 1150a.

[4] The PWC was introduced in the 1958 national coal contract, to which Solar Fuel was itself a signatory by virtue of its membership at that time in the Somerset County Coal Operators' Association. Solar Fuel resigned from the Association in 1958 or 1959, and thereafter was not covered by the national coal agreement. R. 97a-102a.

> conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

(2) That in actual bargaining with Solar Fuel during 1967 and 1968, UMWA negotiators insisted on terms that would bring Solar Fuel into line with the national contract.[5]

Absent any evidence of unlawful union-employer collusion other than PWC itself, the antitrust claim turned on a single question of law: whether PWC should be interpreted to apply to outsiders like Solar Fuel, as Solar Fuel contended; or whether PWC by its terms only had application to those coal operators who were already signatories to the national coal contract, as the Union contended. The trial judge ruled, as a matter of law, that PWC applied to outsiders like Solar Fuel and this, in and of itself, constituted an illegal, actionable conspiracy between the UMWA and BCOA employers.[6]

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[5] The National Bituminous Coal Wage Agreement of 1950, as Amended April 1, 1966. R. 1203a-1210a.

[6] Appendix A to this petition sets out the repeated rulings of the trial judge, made at bench conferences and embodied in jury instructions, to the effect that PWC by its terms applied to Solar Fuel. For example, the following colloquy which preceded instructions of the jury (R. 1055a):

> "THE COURT: . . . I am ruling this [the PWC] applied to Solar Fuel as a signatory. However, I am leaving to the

Under the court's instructions, the only question left for the jury was whether UMWA negotiators had in fact insisted that Solar Fuel sign a contract embodying the same terms as the national coal agreement.[7] The court's charge made clear that the PWC itself must be viewed as obligating the Union to insist on uniformity in its negotiations with outsiders, and the question remaining was simply whether the Union in fact insisted on uniformity as to Solar Fuel.[8] The jury resolved that sole factual issue in favor of

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jury whether the United Mine Workers did, as a matter of fact, try to enforce this. That is a matter of fact for the jury . . . .

"MR. LIVINGSTON [counsel for the Union]: And also, there is a question of whether or not the contract was an agreement, in fact, in restraint of trade or an attempt by the mine workers to represent their membership.

"THE COURT: I am saying it is not a restraint of trade unless it was attempted to be enforced.

"MR. LIVINGSTON: And even if attempted to be enforced, it is not, in effect, a restraint of trade.

"THE COURT: Well, that may be, but I am ruling that it is."

Thereafter the Court instructed the jury as follows (R. 1070a):

"We will say to you that there is, in this case, no direct evidence, other than the language of the contract, itself, of using this agreement as a device for this illegal purpose, to impose these terms on small operators for the purpose of ruining them, but, on the other hand, it does appear that the union, by the use of this language on its face, has disabled itself from negotiating other and less burdensome terms with other operators, whether signatories or not signatories to the agreement."

[7] Union witnesses conceded that the UMWA negotiators asked for a contract with Solar Fuel that gave the same benefits as the national wage agreement, but denied that the Union's negotiating position was inflexible: on their account the Union did not "insist" on uniformity with the national agreement. R. 12a, 1070a-1071a.

[8] Appendix A to this petition contains the trial court's repeated instructions and rulings narrowing the jury's deliberations to the single factual issue of "insistence" *vel non*.

the Company, and it followed, under the court's instructions, that the Union's antitrust liability was complete.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW REPUDIATES THE ESSENTIAL PRINCIPLE THAT THE ANTITRUST LAWS IN NO WAY PROHIBIT LABOR UNIONS AND EMPLOYERS FROM SEEKING WAGE UNIFORMITY THROUGH MULTI-EMPLOYER BARGAINING. AND THUS DOES GRAVE DAMAGE TO THE SCHEME OF THIS COURT'S DECISIONS IN UNITED MINE WORKERS v. PENNINGTON, 381 U.S. 657 (1965), AND RAMSEY v. UNITED MINE WORKERS, 401 U.S. 302 (1971).

This case involves fundamental questions concerning the historic exemption of legitimate Trade Union activities from proscription under the antitrust laws. The decisions below deal a crippling blow to labor unions who seek the proper and lawful goal of industry-wide uniformity in wages and working conditions, and thereby undercut the Federal labor policies articulated by this Court in *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), and the chain of related cases.[9] If permitted to stand, the decisions below—by subjecting both employers and unions with which they bargain as a group to treble damage verdicts—will do grave violence to the concept of multi-employer bargaining and federal labor policy.

The *Pennington* line of cases makes abundantly clear that unions may pursue their valid interest in wage uniformity by (1) bargaining with a multi-employer unit to the end of achieving uniformity in wages

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[9] *Ramsey* v. *United Mine Workers*, 401 U.S. 302 (1971); *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945); *United States* v. *Hutcheson*, 312 U.S. 219 (1941).

and conditions throughout that unit, and (2) bargaining with individual employers in such a manner that uniformity with existing agreements might be the result. These activities, with the aim of industry-wide uniformity, were long ago placed by Congress beyond the reach of the antitrust laws. See, *e.g.*, Sections 6 & 20 of the Clayton Act, 15 U.S.C. § 17 & 29 U.S.C. § 52; Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104.

However, it is true that the antitrust exemption is removed in one narrow circumstance: when a union *agrees and colludes with one group of employers to impose uniform terms on another group of employers,* to the end of running the latter group out of business by raising its labor costs. *Pennington* gives classic expression to the distinction:

> "We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers.
>
> * * * *
>
> "But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."

381 U.S. at 664-65. That carefully-wrought distinction between lawful and unlawful activity, recently reaffirmed in *Ramsey* v. *United Mine Workers,* 401 U.S. 302, 312-13 (1971), must be maintained lest unions be disabled in pursuing, by proper means, the

valid goal of wage uniformity through free collective bargaining.

In this case, the courts below made complete hash of the *Pennington-Ramsey* principles. The lower courts found as a matter of law that illegal union-employer collusion was abroad, predicating that grave conclusion on one item of evidence and that alone: a clause of the Union's master collective bargaining agreement, the natural interpretation of which is totally benign. In so doing, the courts below have brought themselves into direct conflict with every other court to consider the matter (and with the four members of this Court who have given their views on the precise question); have without justification ignored the settled rule that collective agreements should be construed to avoid *per se* illegality when a benign construction is reasonable; and have put the essential scheme of *Pennington* in grave jeopardy by making it virtually impossible for labor unions to take any steps whatever toward the cherished goal of wage uniformity for their members.

A. The Decision of the Third Circuit Below Conflicts Squarely with Repeated Decisions of the Sixth Circuit, Some Made Pursuant to this Court's Mandates in Pennington and Ramsey.

The necessary predicate for an antitrust suit of the present type is a clear showing that the Union conspired and agreed with one set of employers to impose uniform standards on one or more third-party employers—here, upon respondent Solar Fuel. In this case the only evidence ever proffered by respondent as proof of an underlying union-employer conspiracy is a clause of the National Bituminous Coal Wage Agreement of 1958 called the "Protective Wage

Clause" (PWC).[10] Apart from PWC, which naturally enough was admitted in evidence by stipulation of the parties, the trial record simply shows that Solar Fuel's employees chose to be represented by the Union; that Solar Fuel refused to sign a contract with the Union, thus precipitating a strike during 1967 and 1968; and that (according to Solar Fuel's witnesses) the Union tailored its bargaining stance during the unsuccessful negotiations toward obtaining the same terms and conditions from Solar Fuel as were embodied in the national coal contract.[11] In short, apart from PWC there is *nothing whatever in this record* showing unlawful collusion or agreement in restraint of trade.

By singling out PWC as the sole and supposedly sufficient basis for antitrust liability, the courts below have created a decisional conflict of the most direct and unavoidable type, and one which only this Court may resolve. The antitrust implications of PWC have been in litigation for a decade, and every court to consider the question, save only the courts below, has squarely held as a matter of law that PWC in and of itself is wholly lawful and benign. See, *e.g., Ramsey* v. *United Mine Workers,* 265 F.Supp. 388, 412 (E.D.

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[10] The PWC is set out in pertinent part in the Statement, pp. 4-5 *supra.* The PWC was not carried forward in the national coal contracts of 1964, 1966 and 1968.

[11] The Union's witnesses testified that UMWA negotiators adopted a flexible position, not insisting on full uniformity with the national contract—Company witnesses asserted the contrary. This issue was the only question left for the jury on the question of antitrust liability, and the jury found for the Company.

The essential point is that a Union's insistence on uniformity with existing agreements, in and of itself, in no way violates the antitrust laws: "a union may adopt a uniform wage policy and seek vigorously to implement it . . . ." *Pennington,* 381 U.S. at 665 n. 2.

Tenn. 1967), *aff'd,* 416 F.2d 655, 659 (6th Cir. 1969) [12] *rev'd on other grounds,* 401 U.S. 302 (1971), *on remand,* 344 F.Supp. 1029, 1034 (E.D. Tenn. 1972),[13] *aff'd,* 481 F.2d 742, 755 (6th Cir.),[14] *cert. denied,* 42 U.S. L.W. 3326 (1973); *South-East Coal Co.* v. *Consolidation Coal Co.,* 434 F.2d 767, 782 (6th Cir. 1970),[15] *cert. denied,* 402 U.S. 983, *reh. denied,* 404 U.S. 877 (1971); *Tennessee Consolidated Coal Co.* v. *United Mine Workers,* 416 F.2d 1192, 1198 (6th Cir. 1969), *cert. denied,* 397 U.S. 964 (1970); *Lewis* v. *Pennington,* 257 F. Supp. 815, 862 (E.D. Tenn. 1966), *aff'd,* 400 F.2d 806, 814 (6th Cir.),[16] *cert. denied sub nom. Pennington* v. *United Mine Workers,* 393 U.S. 983 (1968), *reh. denied,* 393 U.S. 1045 (1969) (on remand after reversal

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[12] ". . . the disputed Protective Wage Clause, properly construed, did not require the Union to impose the wages therein contained on the nonsignatory employers." 416 F.2d at 659.

[13] ". . . The PWC was limited to signatories only and did not commit or limit the Union in its bargaining with non-signatory coal operators . . . ." 344 F.Supp. at 1034. ". . . The PWC did not constitute an express commitment upon the part of the UMW to bargain with other coal operators only upon terms set forth in the [national] contract . . . ." *Id.*

[14] "[The Court has] dealt extensively with the argument that the Protective Wage Clause constituted a per se violation of the antitrust laws and held that it could not properly be construed to do so." 481 F.2d at 755.

[15] ". . . the National Agreement containing the Protective Wage Clause is, on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. . . . '[T]here is nothing unlawful about that contract in itself' . . . ." 434 F.2d at 782.

[16] ". . . we agree with the District Court that the disputed Protective Wage Clause, properly construed, did not require the Union to impose the wages therein contained on nonsignatory employers." 400 F.2d at 814.

sub nom. United Mine Workers v. *Pennington,* 381 U.S. 657 (1965)).

Succeeding parts of this Petition will show that in unaccountably failing to follow the settled decisional treatment of PWC, the courts below have done grave damage to the scheme of *Pennington* and vital federal policies reflected therein. For the moment it is enough to have demonstrated that through this case the Third Circuit is now at war with repeated decisions of the Sixth Circuit, creating square conflict that is a compelling occasion for exercise of this Court's power of review.

Indeed, as the foregoing string cite shows, the antitrust status of PWC was a central feature of the litigation in *Pennington,* 381 U.S. 657, and *Ramsey,* 401 U.S. 302. In each case this Court itself declined to interpret the PWC or otherwise assess the record evidence bearing on the Union's antitrust liability,[17]

[17] It is instructive to compare the proof attempted by the antitrust claimants in the *Ramsey* litigation, held insufficient, with the one-item showing held sufficient below. In *Ramsey* this Court summarized the attempted proof as follows:

> "Petitioners in any event claimed that a conspiratorial arrangement between the Union and the major operators could be implied from the PWC, the course of negotiations between the Union and those operators from 1950 forward, and the ensuing organizational and strike activity against petitioners and other southeastern Tennessee operators aimed at securing agreement to and in compliance with the National Agreement as amended from time to time, as well as from the Union's purchase of a controlling interest in West Kentucky Coal Com. and the latter's allegedly predatory pricing in the TVA coal market."

401 U.S. at 305. See *Pennington,* 381 U.S. at 659-61, 664. By contrast, Solar Fuel felt no need to proceed beyond the first comma in the recitation above—it put the PWC into evidence (by stipulation), and left its proof of unlawful conspiracy at that. It succeeded; the *Ramsey* claimants failed.

though of course on remand—pursuant to this Court's mandate—the lower courts uniformly decided that PWC did not embody or reflect any illegal conspiracy. However, in *Ramsey* four Justices writing separately did find occasion to address the precise question involved herein:

> "It is argued that this agreement [the 1958 agreement containing PWC] constituted an agreement by United Mine Workers to impose the scale on all nonsignatory coal operators in order to force some (including petitioners) out of business. If that was the agreement then, as I said in Pennington . . ., the Union would have lost its exemption. *But there is not a word in the agreement, as I read it, that covers nonsignatory operators.*"

401 U.S. at 316 (emphasis added). Thus Mr. Justice Douglas, writing for himself and Justices Black, Harlan, and Marshall, came to the identical conclusion that is reflected in the long procession of Sixth Circuit decisions cited earlier, and that is squarely repudiated by the courts below.

B. The Decision Below Clashes with this Court's Firm Admonition that any Labor Contract Must be Construed on its Face to Avoid Per Se Antitrust Liability Whenever Such Benign Construction is Reasonable.

As shown by the reasoned decisions of the Sixth Circuit and the emphatic conclusion of four Justices of this Court, the PWC is wholly benign in purpose and intended effect, and by no means is expressive of any illegal conspiracy. But even if it were thought that PWC is ambiguous on its face—susceptible of two interpretations, one reflecting a lawful agreement and the other not—then the courts below erred gravely in failing to follow the settled rule that the bare lan-

guage of a collective bargaining agreement must be construed to avoid *per se* illegality when such an interpretation is available and reasonable.

This case presents a compelling occasion for review by this Court, to reaffirm the principle that a labor contract should not gratuitously be read to embody an illegal bargain. Here there is *no evidence whatever* of illegal union-employer collusion apart from the words of the PWC—no extrinsic facts to illuminate any ambiguity in the clause itself, much less show the bargaining parties to have intended a result violative of the antitrust laws. It is hornbook law that ambiguities in *any* contract should be resolved in favor of legality, when a benign interpretation is reasonable and not foreclosed by extrinsic evidence of unlawful intent.[18] That constructional rule has been explicitly followed by the Sixth Circuit with respect to PWC itself.[19] And this Court has emphasized the general

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[18] *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U.S. 686 (1931); *Hobbs* v. *McLean*, 117 U.S. 567, 576 (1886); *Washington Capitols Basketball Club, Inc.* v. *Barry*, 419 F.2d 472, 478 (9th Cir. 1969); *Perry Coal Co.* v. *NLRB*, 284 F.2d 910 (7th Cir. 1960), *cert. denied* 366 U.S. 949 (1961); *Aronson* v. *K. Arakelian, Inc.*, 154 F.2d 231, 235 (7th Cir. 1946); *Lubbock Hotel Co.* v. *Guaranty Bank & Trust Co.*, 77 F.2d 152, 156 (5th Cir. 1935); *Behre* v. *Anchor Ins. Co.*, 15 F.2d 380, 383 (2d Cir. 1926); 4 Williston on Contracts (3d ed. Jaeger), pp. 747-8; Restatement of Contracts, Sec. 236.

[19] "The law is well settled . . . that where two constructions of a written contract are reasonably possible, preference must be given to that one which does not result in a violation of law."

Ramsey v. *United Mine Workers*, 265 F.Supp. 388, 412 (E.D. Tenn. 1967), *aff'd*, 416 F.2d 655, 659 (6th Cir. 1969). See also *Lewis* v. *Pennington*, 400 F.2d 806, 814 (6th Cir.), *cert. denied sub nom. Pennington* v. *United Mine Workers*, 393 U.S. 983 (1968), *reh. denied*, 393 U.S. 1045 (1969).

proposition that the rule is especially to be followed with respect to labor contracts,[20] which are instruments drafted by laymen to serve as the basis for continuous, peaceable and fruitful relations between the bargaining parties. Courts and arbitrators must be mindful of the duty to construe such agreements in light of their presumed lawful objectives, and not to intrude and cancel a bargain simply because the words chosen are consistent with either lawful or unlawful aims.

The PWC is embodied in a national wage agreement between the Union and the Bituminous Coal Operators' Association (BCOA), a multiemployer bargaining group. The clause speaks to the matter of maintaining uniform wage standards.[21] On respondents' interpretation—and that of the courts below—the PWC amounts to an illegal conspiracy between the Union and BCOA, whereby the Union agrees to seek to impose the national contract's terms on nonsignatory employers like Solar Fuel.[22] The alternative, wholly

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[20] See the discussion below.

[21] It is set forth in the Statement, pp. 4-5 *supra*.

[22] In fact Solar Fuel has never been clear as to the content of the supposedly illegal bargain, nor was the district court, as is amply shown by the series of bench discussions concerning jury instructions below. See 1a-9a, *infra*. One proffered interpretation of PWC (the one embraced by the lower courts here) is that it commits the Union to impose uniform standards on *all nonsignatories* to the national contract—this interpretation was squarely rejected by the lower courts on remand in *Pennington* and *Ramsey*. The second interpretation (urged unsuccessfully by Solar Fuel below) is rather kinder to the Union and BCOA: The PWC is seen as committing the Union to impose national standards on just those coal operators who *once were signatories* but who for some reason have ceased to be parties to the national contract (*e.g.*, Solar Fuel). The only virtue of the latter view is novelty, bought at the cost of complete infidelity to the text of PWC, which by no

benign interpretation is that PWC is simply an undertaking by the Union and BCOA to maintain uniform contract standards *inter sese*—that is, through PWC the Union expressly promises to police the national contract *as to the signatories* of that contract, to take steps to avert and redress noncompliance *by signatories*, and to forswear deviating local agreements *with signatories* during the life of the national contract.

The latter interpretation, of course, is far and away the more natural and reasonable reading of PWC. The clause itself contains not a syllable suggesting that uniform standards are to be imposed *outside* the multi-employer group. As the Sixth Circuit put the matter in its most recent opinion in *Ramsey*,

> ". . . the PWC refers neither to future nor previous signatories, but rather to 'signatory operators' and to 'employees covered by this contract.' The conclusion must accordingly be . . . that the PWC did not constitute an express commitment upon the part of the UMW to bargain with other coal operators only upon terms set forth in the contract made with the BCOA."

481 F.2d at 754, following 344 F.Supp. at 1034.

By grasping for a malign interpretation of PWC, the lower courts herein adopted an approach flatly at odds with this Court's rulings in *Allen Bradley Co.* v. *Local 3, IBEW*, 325 U.S. 797 (1945), and *NLRB* v. *News Syndicate Co.*, 365 U.S. 695 (1961). Those cases give expression to the vitally important constructional

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stretch makes any such distinction. This "prior signatory" view was likewise squarely rejected on remand in *Ramsey*. See, *Ramsey* v. *United Mine Workers*, 344 F.Supp. 1029, 1034 (E.D. Tenn. 1972), *aff'd*, 481 F.2d 742, 754 (6th Cir.), *cert. denied*, 42 U.S.L.W. 3326 (1973).

principle that a labor contract must not be construed, on its face and absent extrinsic evidence, as evincing an illegal objective when an alternative lawful interpretation is reasonable.

Allen Bradley was the first articulation by this Court of the rule that a labor union may forfeit its antitrust exemption by colluding with employers in restraint of trade. There this Court noted that the union's bargaining agreement itself could be read to reflect an illegal conspiracy, but added:

> "We may assume that such an agreement standing alone would not have violated the Sherman Act."

325 U.S. at 809.[23] In *News Syndicate* this Court confronted a labor contract that by its very terms seemed to set up a discriminatory hiring hall arrangement in violation of the National Labor Relations Act. This Court admonished:

> "... we will not assume that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of Congress. As stated by the Court of Appeals, 'in the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.' "

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[23] In line with *Allen Bradley*, the lower courts have ruled that bargaining agreements should not be construed to embody illegal conspiracies to restrain trade, in cases where a lawful interpretation is available. For example, in *Adams Dairy Co.* v. *St. Louis Dairy Co.*, 260 F.2d 46, 52-55 (8th Cir. 1958), the Court ruled that a labor contract should not be deemed on its face to reflect *per se* illegality under the antitrust laws, absent extrinsic evidence of union-employer collusion directed at third-parties.

365 U.S. at 699-700. See also *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667 (1961).[24]

The failure of the lower courts to heed the admonitions of *Allen Bradley* and *News Syndicate* is particularly devastating to the Congressional exemption of legitimate trade union activity from antitrust liability. In an antitrust suit of the *Pennington-Ramsey* type, the gist of the case is whether unlawful union- employer collusion can be shown. A labor contract by its very nature is a union-employer bargain. If courts are willing to find *per se* illegality on the face of labor contracts, despite the availability of perfectly lawful readings, then this Court need not have bothered to articulate the *Pennington-Ramsey* test. Antitrust liability will turn on draftsmanship, with crushing treble

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[24] *News Syndicate* has been followed faithfully by the lower courts, engendering judicial writing that could not speak more directly to the problem at hand. For example, in *Local 138, Operating Engineers* v. *NLRB*, 321 F.2d 130 (2d Cir. 1963), the bargaining agreement expressly limited certain privileges and benefits to "union members," and the NLRB ruled that such clauses amounted to per se violations of the duty not to discriminate. The Court rejoined:

> ". . . the Board has not shown or even attempted to show that any of [the clauses in question] has been discriminatorily applied. For aught that appears, references to union members in the agreement are simply references, naturally phrased by a union entering into an agreement with an employer, to all employees . . . . We will not approve a finding of a violation which is based solely on words in an agreement which lend themselves as easily to a construction consistent with the Act as to a construction which if carried into effect, would result in conduct illegal under the Act."

321 F.2d at 134. See also, *e.g.*, *NLRB* v. *Southern Stevedoring & Contracting Co.*, 332 F.2d 1017, 1019 (5th Cir. 1964); *NLRB* v. *Miranda Fuel Co.*, 326 F.2d 172, 175 (2d Cir. 1963).

damage recoveries against both unions and contracting employers lurking in every textual ambiguity that slips by negotiators.

The proper rule—which this Court should reaffirm on the occasion of the present case—is that a labor agreement should be presumed to be lawful. If extrinsic evidence shows that the actual conduct of the union and agreeing employers is illegal, then so be it, but the words of a labor agreement "standing alone" should be construed in line with legality whenever a legal construction is reasonable.

C. The Decision Below Uniquely Jeopardizes the Scheme of Pennington and Ramsey by Predicating Antitrust Liability on Precisely the Sort of Union and Employer Conduct that this Court has Endeavored to Protect.

The constructional approach of the lower courts not only turns this Court's *Pennington-Ramsey* test into a trap for the unwary draftsman. It also undermines the fundamental substantive purpose of *Pennington-Ramsey*—to protect unions (and agreeing employers) in their legitimate pursuit of wage uniformity—in a manner that calls for correction by this Court.

The PWC in fact reflects, not any sort of illegal agreement, but precisely the kind of wage uniformity objective that *Pennington* and the other cases hold to be fully protected. Through PWC, the Union and members of the multiemployer unit undertake to maintain uniformity *among themselves* in matters covered by the national agreement (wages, job classifications, pension royalties, and so on). As this Court said in *Pennington,* "a union may adopt a uniform wage

policy and seek vigorously to implement it . . . ." 381 U.S. at 665 n.2.

> ". . . a union may make wage agreements with a multiemployer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior."

Id. at 665.[25]

In this case the evidence is indeed limited to precisely such behavior: a) the Union sought uniformity within the multiemployer group through PWC; and b) the Union, acting on its own, sought to strike a bargain with an independent employer, Solar Fuel, that would bring the latter into line with the national contract.

But the lower courts proceeded to misconstrue the multiemployer uniformity pledge (the PWC) as an illegal agreement to impose national contract standards on nonsignatory third-parties. That mistake of law uniquely threatens the whole scheme of *Pennington* and related cases. For it amounts to saying that a union's insistence on a pledge of uniformity within the

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[25] ". . . labor contracts establishing more or less standardized wages, hours, and other terms and conditions of employment in a given industry or market area are often secured either through bargaining with multiemployer associations or through bargaining with market leaders that sets a 'pattern' for agreements on labor standards with other employers. These are two similar systems used to achieve the identical result of fostering labor peace through the negotiation of uniform labor standards in an industry."

Meat Cutters v. *Jewel Tea Co.*, 381 U.S. 676, 722 (1965) (Goldberg, J.).

multiemployer unit—something that is protected, if not encouraged, by *Pennington*—cannot be distinguished from an illegal conspiracy to turn upon outsiders. By the same token, the lower courts' approach means that once a union has achieved multiemployer uniformity, it must thereafter be extremely tender in negotiating with outsiders, to avoid any appearance of insisting on uniform terms for the industry.

In short, the lower courts have said precisely the opposite of what this Court said in *Pennington*: the decisions below mean that a union may *not* "adopt a uniform wage policy and seek vigorously to implement it."

This Court should grant certiorari because the proper resolution of the legal issues in this case is essential lest the scheme of *Pennington* be destroyed as a practical matter. It has become necessary for this Court further to articulate the *Pennington-Ramsey* test, and to affirm specifically:

a) That it is wholly proper and lawful for a labor union to seek to ensure uniformity within a multiemployer unit and to give voice to this objective by way of mutual covenants in a multiemployer agreement; and

b) that a clause in a multiemployer contract, which can reasonably be interpreted to aim simply at uniformity *within the unit* must not be interpreted as illegal collusion aimed at imposing uniform terms on outsiders absent clear extrinsic evidence that such a conspiracy in fact exists.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court's writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A

Excerpts from the District Court's Jury Instructions and Rulings from the Bench Pertaining to the Antitrust Question

[Colloquy before instructions are first given to the jury]

THE COURT: . . . I am ruling this [The Protective Wage Clause] applied to Solar Fuel as a signatory. However, I am leaving to the jury whether the United Mine Workers did, as a matter of fact, try to enforce this. That is a matter of fact for the jury because of the sharp contradiction between what Mr. Berkey said and Mr. Lease and others said.

MR. LIVINGSTON [Counsel for the UMWA]: And, also, there is a question of whether or not the contract was an agreement, in fact, in restraint of trade or an attempt by the mine workers to represent their membership.

THE COURT: I am saying it is not a restraint of trade unless it was attempted to be enforced.

MR. LIVINGSTON: And even if attempted to be enforced, it is not, in effect, a restraint of trade.

THE COURT: Well, that may be, but I am ruling that it is. (R. 1055a)

[Excerpts from the first instructions to the jury]

[THE COURT:] Now, in other words, what we are saying is, if this language amounts to an agreement by the United Mine Workers with the major coal operators to impose the conditions of the national contract upon small operators to the latter's damage, then the union can be held liable for the violation of the antitrust laws.

We will say to you that there is, in this case, no direct evidence, other than the language of the contract, itself, of using this agreement as a device for this illegal purpose, to impose these terms on small operators for the purpose of ruining them, but, on the other hand, it does appear that the union, by the use of this language on its face, has disabled itself from negotiating other and less burdensome

terms with other operators, whether signatories or not signatories to the agreement.

You will recall that Solar Fuel was a party and signatory to this agreement and then withdrew, that later on an election was held and, after deciding contested ballots, the NLRB determined to certify the U.M.W. as the bargaining agent for Solar's employees, but Solar, nevertheless, refused to bargain—the reasons for which were discussed by Mr. Berkey—and the union allegedly called the strike for the purpose of imposing the terms of the national agreement upon plaintiff, Solar.

You will recall there is a sharp conflict in the evidence about the course of these negotiations. Plaintiffs' witnesses tell you that the union negotiators, including Mr. Yablonski, who it appears is now deceased, insisted throughout that Solar sign the national agreement without any exceptions. The evidence on behalf of the union, however, is that Mr. Yablonski indicated that he had authority to negotiate any or all terms of the national agreement. It appears, particularly, that the plaintiff, Solar, objected to the payment of 40 cents per ton for the miners' welfare and retirement fund required on page two of the 1964 amendment to the national agreement and also objected to the union shop provisions. You will recall the company's testimony is that the union changed its approach after the 1968 agreement was signed, which was before execution of the amendment, Exhibit 209, and indicated, in the fall of 1968, that they were willing to negotiate other terms.

If you believe Solar's testimony that the union, throughout, refused to negotiate any of the terms of the national agreement as a result of having been disabled by the so-called protective wage clause, part of which I read to you, and that the union insisted upon these terms and no others as a result of these provisions of the contract, then you would be justified in finding that the union was a party to the agreement used in restraint of trade in viola-

tion of the antitrust laws, and you would be justified in finding for the plaintiffs in this antitrust matter. You would also be justified in finding damages for the plaintiffs, Solar Fuel Company and Paul Shrechengost, as parties who were injured by such an agreement and the attempted enforcement of it. If, on the other hand, you find that the defendants' evidence is correct and that the union did not insist upon these terms and no others, then you should find for the defendants with respect to the anti-trust claims in this suit because they have not used this contract, regardless of what it says, as a contract in restraint of trade. (R. 1069a-1072a)

[Objections of counsel to the first jury charge, at the bench]

MR. METZ [Counsel for Solar Fuel]: Third, as to the protective wage clause, you used the expression, "Whether signatory or not signatory," and, since we don't have a party here that was not signatory, I think it should refer to where the party is a signatory. I don't want to be in trouble, but you may have said something which might not be true.

MR. LIVINGSTON: This has been my position all along, that a non-signatory to the agreement during the term of the agreement would not be bound by the language of it, and that, in this particular case, my position is that Solar Fuel is, in fact, a non-signatory.

MR. METZ: But His Honor is telling them they are a signatory, and all I am asking is that the instruction be limited to the parties, like Solar, who were signatory, not to a complete non-signatory. Do you understand my problem?

THE COURT: Yes.

MR. LIVINGSTON: I think it was the opinion of the Court, when we discussed this in Chambers earlier, that, whether or not they were a signatory, the language was in restraint of trade between—

MR. METZ: No. The Court based this entirely upon Justice White's—

THE COURT: I think I will tell them Solar was a signatory. (R. 1096a-1097a)

* * * * *

MR. LIVINGSTON: I would also object to that portion of the Court's charge in which it indicates that, if the union had no power to negotiate the contract, that was in violation of the Sherman Act, and it is my impression that, if the union failed to negotiate the contract because of its agreement with the signators to the contract, that it would be in violation of the Sherman Act, but, if it was the desire of the union not to negotiate from that basic contract because it made the determination that this was in the best interests of the miners and it was not in pursuance of any conspiracy, that that would not be in violation of the Sherman Act. I think, in the present state of the charge, that the simple refusal to negotiate or depart from the language of the basic contract would constitute, in the present state of the charge, a Sherman Act violation.

THE COURT: I think that is covered amply by the general charge.

MR. METZ: I am satisfied the charge is all right.

THE COURT: Any further attempt to elaborate would just muddy the waters. (R. 1098a-1099a)

[The Court amplifies its first instructions]

THE COURT: It has also been claimed I was not clear about Solar Fuel Company being a signatory to this agreement. Remember the word "signatory" is used in this language. and it appears they were signatories to the original agreements. They were signatory some period of time thereafter. Then, they cancelled their membership in the organization, and the agreement covers signatories. Solar was an original signatory. (R. 1100a)

[After deliberating for some time, the jury asked the Court to repeat its instructions. (R. 1103a) That request was refused. (R. 1103a-1104a) The jury then asked specifically: "We would like to know what the Court's instruc-

tions were in regard to violation of the antitrust laws." (R. 1105a) The Court's response was much the same as its original instructions, including:]

[THE COURT]: We will say to you that there is, in this case, no direct evidence, other than the language of the contract, itself, of using this agreement as a device for this illegal purpose, to impose these terms on small operators for the purpose of ruining them, but, on the other hand, it does appear that the union, by the use of this language on its face, has disabled itself from negotiating other and less burdensome terms with other operators not signatories of the agreement. (R. 1110a-1111a)

* * * * *

Now, if you believe Solar's testimony to the effect that the union refused to negotiate any of the terms of the national agreement as a result of having been disabled by the so-called protective wage clause, part of which I read to you, and that the union insisted upon these terms and no others as a result of these provisions of the contract, then you would be justified in finding that the union was a party to the agreement in restraint of trade, in violation of the antitrust laws, and you would be justified in finding for the plaintiffs, Solar Fuel Company and Paul Shrechengost, as parties injured by such agreement. If, on the other hand, you find that defendants' evidence is correct and the union did not insist on these terms and no others, then you should find for the defendants with respect to the antitrust claims in this suit. (R. 112a)

* * * * *

That is the factual question, members of the jury, which I am leaving to you to determine, whether the United Mine Workers endeavored to use this agreement, as written, for the purpose of enforcing an illegal contract, to force these terms on all employers, or whether, even though they were bound by this agreement, the United Mine Workers, never-

theless, did not attempt to enforce it on Solar Fuel in this case. That is a question you will have to determine.

Does that make it any clearer?

(Members of the jury indicate in affirmative.) (R. 1113a)

[Objections of counsel to the second jury charge, at the bench]

MR. LIVINGSTON: I take specific exception to that portion of the additional charge contained in the language embraced by, "If, on the other hand, you believe such and such," which limits the basic factual issue under the antitrust violation as to whether or not the agreement was forced upon Solar Fuel Company, and, if the agreement was forced upon Solar Fuel Company, the Court has indicated that the decision must be in favor of Solar Fuel or, if there was an attempt to enforce —

THE COURT: I was going to say "attempt to enforce."

MR. LIVINGSTON: If there was an attempt to enforce this agreement upon Solar Fuel, then the finding must be in favor of Solar Fuel. It is the position of the defendants in this case that the attempt to enforce an agreement alone, without more, is not sufficient to sustain the finding for Solar Fuel in the instant case. That is all.

THE COURT: Exception denied. I don't think I said that. I said, if they used these means and these other unlawful acts in an endeavor to enforce it upon them.

MR. LIVINGSTON: My exception—I don't remember it verbatim, but it was contained in that portion isolating the facts to be decided as far as the restraint of trade was concerned, the language contained in the charge that preceded the language, "If, on the other hand." It was that portion that I remember.

THE COURT: I will say I did not intend and I don't think I did direct a verdict. I said, "You would be justified." (R. 1114a-1115a)

[After another hour and forty minutes of deliberation, the jury asked the Court another question: "We would like

to have the Court further explain to us the U.S. Supreme Court's decision in regard to paragraph A of the protective wage clause amended effective December 1, 1958, of the National Bituminous Coal Wage Agreement." (R. 1115a) A discussion at the bench ensued.]

THE COURT: The trouble is this clause A, paragraph A [of the PWC], has two sentences in it, and one applies to any agreement, and the second one applies to signatories, as I read it. The first says, "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable district contract." Doesn't that cover anybody? Whether it is a signatory or not, they will not be a party with anybody.

MR. METZ: It may, but, since we don't have a non-signatory involved here, why cross that bridge?

THE COURT: It is a question whether they were a signatory at the time they were doing this.

MR. METZ: They were a signatory from 1958.

MR. LIVINGSTON: I think there is a question whether that P.W.C. is part of the agreement—properly a part of the agreement in effect in 1967.

MR. METZ: It was still in effect in 1968. It stayed in until 1969, and it never changed. It was in throughout this whole period. It was never taken out until '69.

THE COURT: You will recall that I said this, "But, on the other hand, it does appear that the union, by the use of this language on its face, has disabled itself from negotiating other and less burdensome terms with other operators not signatories of the agreement."

MR. METZ: That "not signatories" is what confuses them. All we are dealing with here are signatories.

THE COURT: "You will recall the testimony that Solar Fuel, a family organization, was a party and signatory on this agreement and then withdrew."

MR. METZ: The first sentence saying "not signatories," and then saying Solar is a signatory, I think, is what is confusing them.

THE COURT: I think the language covers both.

MR. METZ: As far as my case is concerned, I don't care about non-signatories.

THE COURT: I ruled that Solar was a signatory.

MR. METZ: That's right. (R. 1116a-1117a)

* * * * *

MR. LIVINGSTON: I would object, again, for the same reasons as before, that I fail to see the relevance in the light of this clause, alone, with nothing more than the clause, which I think, from the outset, I considered to be irrelevant.

THE COURT: What I have said is that there is no actual proof of any — of them saying to certain groups of employers —

MR. METZ: Except the agreement, itself.

THE COURT: There is no evidence of anything occurring in a back room where Boyle said to the big boys, "Okay, we will help you get these fellows off your backs." If there was anything like that, it would be different.

MR. METZ: The only thing we have here is the agreement, itself. (R. 1121a-1122a)

[The Court answered the jury's request by rephrasing earlier versions of its antitrust instructions. Fifteen minutes later the jury returned with a final plea for clarification. (R. 1129a-1130a) The Court instructed:]

THE COURT: If they [the UMWA negotiators] said, in the beginning, we will negotiate on any terms you want, then they have not used that agreement (the PWC) as

an instrument to violate the antitrust law, and you cannot find such violation. If they did use it in this case, then you would be justified in making such a finding. (R.1131a)

[The verdict as to antitrust liability in final form]

THE CLERK: Members of the jury empaneled in the case of Solar Fuel Company, a Pennsylvania Corporation, and Paul Shrechengost, plaintiffs, versus United Mine Workers of America and United Mine Workers of America District No. 2, defendants, at Civil No. 69-27, you say you find, Special Interrogatories to the jury, special verdict:

"1. Do you find that the defendants, United Mine Workers and United Mine Workers District No. 2, were parties to an agreement in restraint of trade in violation of the antitrust laws under the previous instructions of the Court? Answer: Yes.

"2. If and only if your answer to the above question is yes, what damages do you find were sustained by the plaintiff which were the proximate result of such violation of the antitrust laws? Solar Fuel Company: $125,000. Paul Shrechengost: Zero. . . ."

So say you all?

(The members of the jury indicate in the affirmative.) (R. 1132a-1133a)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

SOLAR FUEL COMPANY and PAUL SCHREKENGOST

v.

UNITED MINE WORKERS OF AMERICA and UNITED MINE WORKERS OF AMERICA, DISTRICT NO. 2

Civil Action No. 69-27

Opinion and Order Denying Motion for Judgment Notwithstanding the Verdict or in the Alternative for New Trial

KNOX, District Judge

This case is another in the series of actions against the United Mine Workers of America (herein called U.M.W.) for alleged violation of the antitrust laws as the result of the inclusion in the National Bituminous Coal Wage Agreement by amendment effective December 1, 1958, of a so-called protective wage clause, whereby the union agreed not to make any agreement or understanding with any signatory as to wages, hours or other conditions of work except on the basis and the terms of the National Agreement. The United States Supreme Court has on several occasions considered this clause and indicated that under the circumstances this may involve a violation of the antitrust laws. See United Mine Workers of America v. Pennington, 381 US 657, 14 L ed 2d 626, 85 S Ct 1585 (1965); Ramsey v. United Mine Workers of America, 401 US 302, 28 L ed 2d 64, 91 S Ct 658 (1971). See also South-East Coal Co. v. Consolidation Coal Co., 434 F 2d 767 (6th cir 1970) cert. den. 402 US 983.

In the instant case, plaintiff Solar Fuel Company through its membership in Somerset County Coal Operators Association was originally a signatory to the 1958 Agreement containing this protective wage clause. It later (1961-

2) withdrew from membership in the association and beginning July 17, 1967, and extending through until the end of the year 1968 was involved in a bitter and violent dispute with the U.M.W. District No. 2 which included mines in Somerset County, Pennsylvania. It was stipulated that District No. 2 was an administrative arm of the international union of the U.M.W. of America.

The record is replete with evidence of extreme violence even to the extent on some occasions endangering life. Mine vehicles were burned and run off cliffs. Mine buildings and equipment were burned and otherwise destroyed and damaged. Loads of coal were dumped on a road giving access to one of the mines. The roads were strewn with large nails inserted through bottlecaps so as to puncture the tires of any vehicles passing, explosives were thrown and some people were set upon by mobs of 50 or 100 people and beaten and kicked. An injunction issued by the Court of Common Pleas of Somerset County limiting the number of pickets in an attempt to stop the violence was ignored and at times pickets in the number of 800 or 1,000 assembled on the roads leading to the mines, the group being so great as to overwhelm the State Police who came to the assistance of the sheriff in attempting to enforce the injunction. The judge issuing the injunction was defied in his courtroom by one of the officers of the international union who told him that the next day the pickets would be out in even greater numbers. There is evidence in the record from which the jury could infer as it did that these acts were fomented, encouraged, condoned or ratified by officers and representatives of both District No. 2 and of the International Union who did nothing to control the actions of the mobs or to discipline the union members involved although the evidence shows these officials and representatives were present on the picket line. The evidence further shows that Mr. Jock Yablonski, since murdered, throughout the course of negotiations insisted that the plaintiff coal company had to

accede and submit to the terms of the protective wage clause and pay the royalties due per ton of coal into the Welfare and Retirement Fund of the Union and that the Union insisted that it was without power to negotiate a contract on any other terms. This, of course, was denied by the Union witnesses and thus presented a question for the jury which was submitted to them and by their verdict have found that plaintiff's version was true.

Plaintiff brought suit against the union in this court upon three causes of action.

(1) Unfair labor practices in violation of the National Labor Relations Act,

(2) Violation of the antitrust laws, particularly Section 1 of the Sherman Antitrust Act (15 U.S.C. 1), and

(3) A pendent state cause of action under Pennsylvania State law for destruction of real estate and personal property and interference with the business of the plaintiff's company. Paul Schrekengost, company manager, also joined in this suit claiming damages under the antitrust laws and for destruction and injury to his automobile and other personal property. At the time of trial the court instructed the jury that plaintiffs had made out no cause of action based upon unfair labor practices (N.T. 1053 [R. 1064a]) but submitted the other two causes of action to the jury in the form of a special verdict containing special interrogatories. The jury's answers were as follows, (N.T. 1121 [R. 1132a]):

> "1. Do you find that the defendants, United Mine Workers and United Mine Workers District No. 2, were parties to an agreement in restraint of trade in violation of the antitrust laws under the previous instructions of the court? Answer: Yes.
>
> "2. If and only if your answer to the above question is yes, what damages do you find were sustained by the plaintiff which were the proximate result of such

violation of the antitrust laws? Solar Fuel Company: $125,000. Paul Schrekengost: Zero.

"3. Do you find the plaintiffs are entitled to recover from the defendants for wrongful acts in connection with the conduct of this strike? Answer: Yes.

"4. If your answer is yes, in what amount do you find plaintiffs are entitled to recover for these acts? Solar Fuel Company: $30,000. Paul Schrekengost: $2,000.

"5. Do you find that, in addition, plaintiffs are entitled to punitive damages for the wrongful acts of the defendants in the conduct of the strike? Answer: Yes.

"6. If your answer is yes, what amount of punitive damages do you award to plaintiffs? Solar Fuel $15,000 Paul Schrekengost: $1,000."

When the verdict was rendered, the court further interrogated the jury as to whether the amount of $30,000 awarded the company in the answer to Question 4 was included in the $125,000 awarded in question number 1 or whether the $30,000 was intended to be an addition thereto. The jury all responded that the $30,000 was in addition to the $125,000. (N.T. 1122-23 [R. 1133a-1134a]). Since the jury verdict was against both defendants, the court trebled the $125,000 to $375,000 and entered judgment on this amount plus $45,000 being the total of actual and punitive damages awarded the company under the pendent state cause of action plus judgment in favor of the plaintiff Paul Schrekengost for $3,000 as awarded in the answers to questions 4 and 6. It will be noted that the jury's verdict was against both defendants although they had been told (N.T. 1081 [R. 1092a]) they could find against either or both.

The defendants have now moved for Judgment Notwithstanding the Verdict (Judgment in Accordance with Motion for Directed Verdict) or in the Alternative for a New Trial alleging numerous reasons. The main issues

were thoroughly briefed and argued by counsel. In view of matters brought to our attention after the argument by plaintiff's counsel, we ordered a reargument as to the question of whether the protective wage clause was in effect at the time of the events complained of from July 17, 1967, to October 1, 1968. This reargument has been held and this question has been rebriefed and after thorough consideration, we have determined that we must deny defendant's motions.

1. *Rescission of Protective Wage Clause*

At the threshold, we are met with defendant's present main contention which was the subject of the reargument, viz: that the protective wage clause was repealed by amendments to the National Agreement dated April 2, 1964, and therefore was not in effect in 1967-1968 and can form no basis for any cause of action based upon the anti-trust laws. It will be noted that even if this argument is accepted, it does not wipe out plaintiff's claims under the pendent state causes of action as covered by the jury's answers to questions 3-6, inc.

The protective wage clause, which is the heart of the matter, is contained in the amendment of December 1, 1958.[1] In addition to the language quoted in the footnote,

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[1] "The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows:

A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages,

hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

B. It is recognized that when signatory operators mine, prepare or procure or acquire under subcontract arrangements, bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stablized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract.

'Procured or acquired under a subcontract arrangement' means any contract, lease, license, agreement, arrangement or understanding pursuant to which the signatory operator acquires coal, either as principal or agent, directly or indirectly from a producer other than such signatory for delivery to a person other than such signatory.

The obligation assumed hereunder shall not affect any agreement in effect as of the date of execution of this contract: provided, however, that any operator signatory hereto who is a party to any agreement inconsistent with the obligations assumed hereunder shall not maintain such inconsistent agreement in effect beyond the first date at which such agreement may be terminated by him in accordance with its terms.

The Operators signatory to this agreement shall so conduct their own operations (whether operated directly or indirectly, or through subsidiaries or affiliates) so as to fully comply with their obligations under this Clause. The obligation of each Operator signatory hereto, which is several and not joint, to fully perform all the conditions in this paragraph B contained, shall be a direct and continuing obligation of said Operator during the life of this agreement.

As a part of the consideration for this agreement, the Operators signatory hereto agree that this Clause covers the oper-

the union and operators bound themselves to undertake certain detailed steps to carry out the terms of the protective wage clause as more fully set forth in the ensuing paragraphs of the agreement.

The union claims that this clause was wiped out and rescinded by the amendments of April 2, 1964.[2] The union

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ation of all the coal lands, coal producing or coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the terms of this Agreement) be put into production or use. The said Operators agree that they will not lease, license, or contract out any coal lands, coal producing or coal preparation facilities as a subterfuge for the purpose of avoiding the application of this Clause."

[2] "WHEREAS on September 29, 1952, and at various dates subsequent thereto, certain coal associations, companies and individuals (generally referred to as 'Operators'), in their association, company and individual names and capacities, executed with the United Mine Workers of America an Agreement denominated 'National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952'; and said Operators, signatory to this agreement, have now negotiated with the United Mine Workers of America *certain additional amendments* to said 'National Bituminous Coal Wage Agreement of 1950' and it is the agreement and intent of all parties hereto to amend and supplement and *as amended and supplemented* to carry forward and preserve the terms and conditions of said 'National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952', said 'National Bituminous Coal Wage Agreement of 1950', and all previous Agreements as therein provided:

NOW, THEREFORE, THIS AGREEMENT, effective April 2, 1964, by and between the coal operators, associations, companies and individuals signatory hereto and by and between such other and additional associations, companies and individuals as may hereafter become signatory hereto (hereinafter referred to as 'Operators') as parties of the first part, and the International Union, United Mine Workers of America (hereinafter referred to as 'Mine Workers') on behalf of each member thereof, as party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements *and, as amended, modified and supplemented,* carries forward and pre-

claims that a result of these amendments all that remained was the original National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952, plus the amendments contained in the agreement of April 2, 1964.

After the original argument at which, as will be discussed more fully hereafter, the defendant for the first time clearly advanced this issue in the case, plaintiff's counsel commendably called to the court's attention the dicta in certain cases which seemed to support defendant's position. After studying these cases and the language of the agreement, we have concluded that defendant's position is not well taken and that the protective wage clause was in effect in the years 1967-1968 until expressly rescinded by the National Bituminous Coal and Wage Agreement of 1968, effective October 1, 1968.

In the Ramsey case as tried in the District Court in 1965 265 FS 388 (E.D. Tenn. 1967) we find this language: "In the 1964 Amendment of the National Bituminous Coal Wage Agreement, the protective wage clause was eliminated *or so the union contends.*" This, of course, was not necessary to the court's decision and is merely a recognition that the union made the same representation in that case that it now makes here.

Again, in South-East Coal Co. v. U.M.W. of America, supra, the court said (p. 780): "The Protective Wage Clause was dropped from the Agreement in that year (1964)." Again, this was unnecessary to the court's decision which left untouched the verdict of the jury and judgment thereon against the union which had been rendered thereon in the lower court.

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serves the terms and conditions of the 'National Bituminous Coal Wage Agreement of 1950 as amended September 29th, 1952', the 'National Bituminous Coal Wage Agreement of 1950', and all previous Agreements as therein provided, such amendments, modifications and Supplements being as follows, to wit:" (Emphasis added.)

The third case involving this clause and the question now before us is Riverton Coal Co. v. U.M.W., 453 F 2d 1035 (6th cir 1972) which was not an antitrust action at all but was rather a case for damages under Section 303 of the Labor Management Relations Act. This arose from a strike which ended on April 19, 1964, followed by another strike in 1966. In other words, this was a suit for violation of the no-strike clause in the agreement. The court at page 1039 did say: "The 1964 Amendment contained the so-called eighty cent penalty clause and the coal lands clause which Riverton objected to as being illegal. The protective wage clause was dropped from the agreement in that year." Here again, this was dictum unnecessary to the decision in the case that the union was liable in damages for violating the no-strike clause of the agreement.

As above stated, we have concluded that there is no evidence that the protective wage clause contained in the 1958 amendment was terminated by the 1964 amendment and that as a matter of fact it was not terminated until the 1968 agreement, effective October 1, 1968. We observe that the first whereas clause in 1964 recited that the parties have negotiated certain *additional amendments* to the National Bituminous Coal Wage Agreement of 1950 and it is the agreement and intent of all parties hereto to amend and supplement and *as amended and supplemented* to carry forward and preserve the terms and conditions of said National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952, said National Bituminous Coal Wage Agreement of 1950 and all previous agreements as therein provided. The second paragraph provides that this agreement "amends, modifies and supplements and *as amended, modified and supplemented* carries forward and preserves the terms and conditions of the National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952, and the National Bituminous Coal Wage Agreement of 1950 and all previous agreements as therein provided." Certainly if the parties had

intended to wipe out such an important matter as the protective wage clause, they could have clearly and unambiguously set forth their intention to do so. That they did know how to do so is shown by the definite and certain language set forth in the 1968 agreement (plaintiff's Exhibit 209) wherein on page 14 it was clearly set forth:

> "Any and all provisions of any contracts or agreements between the parties hereto or some of them whether national, district, local or *otherwise providing for protective wage clause* and a modification of this agreement or said agreements if a more favorable wage agreement is entered into by the United Mine Workers of America, are hereby *rescinded, cancelled, abrogated and made null and void.*"

The rule is that the burden is on a party claiming rescission or abandonment of a contract to prove it. Fritz v. Lyons, 185 Pa Super 549, 138 A 2d 185 (1958). When the execution of a written contract is admitted a party claiming rescission or abandonment has the burden of proving it. Aschenbach v. Stoddard, 253 Pa 338, 88 A 604 (1916). (This case incidentally also holds that you cannot submit a case to a jury on one theory and then question the correctness of the submission.) An agreement to rescind must be clearly expressed, 17 Am Jur 2d Contracts, Sec. 490.

This case is somewhat similar to th problem which confronted the Pennsylvania Supreme Court in Johnson's Trust, 435 Pa 303, 255 A 2d 571 (1969) where it was held that a second codicil to a will ratifies and confirms an intermediate codicil although not specifically mentioned. In other words, the will is ratified and confirmed as it stands including the intermediate codicil on the date of execution of the second codicil. By the same token, when the 1964 agreements referred to the agreements of 1950 and 1952 as amended and modified, this carried with it all intermediate amendments including the protective wage clause in the amendment of 1958.

There is a further reason why we should not permit the issue of prior rescission of the protective wage clause to be injected into the case at this time. We have thoroughly examined the record in this case and nowhere was this issue raised in the pleadings, in the pretrial narrative statements, at the pretrial conference or during the trial itself. It is noted that in the pretrial stipulation, paragraph 14, which was offered in evidence, defendants admitted that they had attempted to cause plaintiff to enter into a contract with defendants in the same form as the National Bituminous Coal Wage Agreement as amended. Exhibit 208 containing the original agreement and the various amendments including the protective wage clause was offered in evidence on page 29 [R. 46a] without objection by the defendants. It was specifically stated that it was offered in evidence as being in effect during the period July 17, 1967, through December 6, 1968.

We have combed the record and find nothing therein relative to this issue prior to page 1044 [R. 1055a] of the transcript of trial when the evidence was closed and the court was conferring with counsel relative to instructions. The court ruled that the jury was to decide whether or not the U.M.W. did as a matter of fact try to enforce this protective wage clause. At the top of the page, counsel made an oblique reference with the cryptic remark "and the period of that contract was not 1967-1968". This apparently however had reference only to the question of whether Solar Fuel was a signatory within the terms of the agreement having resigned from the Coal Operators Association some years previously. The court did however rule that Solar Fuel was originally a signatory through its association and was therefore one of those covered by the terms of the agreement.

Nothing further was said about the rescission of the protective wage clause until page 1106 [R. 1117a] after the charge of the court and after the jury had been deliberat-

ing some hours and had returned with a question asking the court to further explain the United States Supreme Court's decision relative to the protective wage clause. At page 1105 [R. 1116a], Mr. Livingston, defendants' counsel, for the first time mentioned this issue when he said: "I think there is a question whether that PWC was properly part of the agreement in effect in 1967." At page 1114 [R. 1125a], after further discussion, defendants' counsel stated that his objection was that this particular clause should not be considered a part of this contract and at page 1120 [R.1131a], counsel took exception to the instruction of the court to the jury as to the use of this clause.

In other words, not until after the jury was charged and had retired for deliberation with the case completely submitted to them did defendants' counsel inject this issue into the case. As previously stated, a party cannot submit a case to a jury on one theory and then after summation adopt an entirely different theory. See Zweig v. Bethlehem Supply Co., 186 F 2d 20 (5th cir 1951).

Further, to permit this new theory to be injected at the close of the case would completely undermine the integrity and effectiveness of the pretrial procedures and pretrial order in this case. Pretrial narrative statements had been filed by both parties pursuant to Rule 5-II of this court and after the pretrial conference, a pretrial order was entered which provided that the parties shoud be limited to the issues set forth in the pretrial statements and pretrial stipulation. Under our Rule 5-II(G),[3] defendant was limited to the defenses disclosed in the pretrial narrative statement or at the pretrial conference with certain ex-

[3] "Failure to fully disclose in the pretrial narrative statement or at the pretrial conference the substance of the evidence as to liability, defenses, and damages proposed to be offered at the trial, will result in the exclusion of that evidence at the trial. The only exceptions will be (1) matters which the Court determines were not discoverable at the time of the pretrial conference, (2) privileged matter, and (3) matter to be used solely for impeaching purposes."

ceptions not here important. While we appreciate that there may be a further variation from pretrial procedures in order to prevent manifest injustice to a party, it appears to the court that to allow the interjection of his ambiguous defense after the case has gone to the jury would only serve to inflict an injustice upon the plaintiff who had not previously been apprised of any such defense.

Recently, the Court of Appeals of this Circuit in Shuber v. S. S. Kresge Co., 458 F 2d 1058 (3d cir 1972) had this to say about a similar situation at page 1061:

> "Going on, however, Judge Weber also stated: '[T]he Court has an interest to support the integrity of its pretrial procedures. The Pretrial Order in the case binds and limits the parties to what they have presented and revealed in their Pretrial Narratives and at the Pretrial Conference. Neither at the Pretrial Conference, nor in the trial was this new line of evidence suggested. We must either require adherence to our Pretrial Rules or abandon them utterly in this case. We think that the interests of the efficient administration of justice require their enforcement.' With statement of the trial Judge we are thoroughly in accord."

We therefore hold that the injection of this alleged defense of rescission of the protective wage clause into the case came too late. We also overrule defendants' motions for new trial insofar as they claim the verdict was against the weight of the evidence or unsupported by the evidence for the reason that the great weight of the evidence indicated that the defendants had attempted to force this protective wage clause upon Solar Fuel despite its alleged ruinous effect upon the plaintiff and that the union officials both district and international had refused to negotiate with plaintiff on any terms other than a contract including protective wage clause. By their agreement with the large operators the unions had disabled themselves from negotiating on any other terms.

2. *Liability of Union For Violation Of Antitrust Laws.*

The defendants next claim that the court should not have submitted to the jury the question of whether defendants' conduct in entering into the protective wage clause with the coal operators and in attempting to impose it by force and violence upon Solar Fuel Company was a violation of the antitrust laws from which of course unions are generally exempt under 15 U.S.C. 17. They also claim that the defendant unions cannot be held responsible for unlawful acts of individual officers, members or agents except upon "clear proof of actual participation in or actual authorization of such acts or ratification of such acts after actual knowledge thereof," 29 U.S.C. 106, and that there was an absence of clear proof as required by this act to send the case to the jury. The court at N.T. 1050 and 1051 [R. 1061a and 1062a] painstakingly explained to the jury that with respect to liability of the labor unions the jury must find clear proof of the "direction, authorization, participation in or ratification of such acts by the defendant as they are above explained". The jury was further told that they could consider the presence of the organizers on the picket lines, their participation and instructions to pickets, their repudiation or lack of repudiation of alleged misconduct and disciplinary action taken or not taken against individuals. Clear proof was properly defined as "clear, unequivocal and convincing proof". It was differentiated from the requirement of proof beyond a reasonable doubt in criminal cases and it was explained to the jury that this standard of proof applied not only to the charges of violation of the antitrust laws but also to the claims under Pennsylvania law for destruction of property. The jury was however informed that this standard of proof only applied to the question of whether the defendant unions or either of them are liable for the alleged acts of misconduct and it had no application to other acts in the case as to which the plaintiff had the usual burden in civil cases of proof by a preponderance of the evidence.

It appears that these instructions were in strict conformity with the requirements of U.M.W. v. Gibbs, 383 US 715, 16 L ed 2d 218, 86 S Ct 1130 (1966) and Ramsey v. U.M.W., 401 US 302, 28 L ed 2d 64, 91 S Ct 658 (1971). As above noted there was ample evidence from which the jury could find that there was clear proof that officers and organizers from both the district and the international were present at the times of occurrences complained of, that they participated in and condoned them, and failed to take any disciplinary action against the union members guilty of misconduct. While much of this testimony was oral, nevertheless it certainly measured up to the standards of "clear proof".

The jury was further told at N.T. 1056 [R. 1067a] that labor unions generally were exempt from the antitrust laws and were free to pursue their legitimate ends in securing better wages and working conditions for their members without being held liable under the antitrust laws. But the jury was also instructed that the crucial point in this case was whether under these circumstances the agreements were in violation of these laws and whether the protective wage clause as sought to be enforced by the unions in this case had become and was used as an agreement in restraint of trade in violation of the Sherman Act the purpose of which had been explained to the jury. At page 1058 [R. 1069a], the court read to the jury the following quotation from U.M.W. v. Pennington, [3]81 US 657, 14 L ed 2d 626, 85 S Ct 1585 (1965) which clearly summed up to the jury the problems:

> "Now, the United States Supreme Court, with reference to this matter, has said that 'A union may make wage agreements with a multi-employer bargaining unit'—that is the coal operators—'and may, in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior, but we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of

> employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it is true, even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry. Thus, the relevant labor and antitrust policies compel us to conclude that the alleged agreement between the U.M.W. and large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws."

The jury was then told that it did appear that the union by the use of this language in the contract had disabled itself from negotiating under less burdensome terms with other operators, and that if the jury believed the plaintiff's testimony that the union had throughout refused to negotiate any of the terms of the national agreement as a result of having been disabled by the so-called protective wage clause, that the union insisted upon these terms and no others, that then the jury would be justified in finding that the union was a party to an agreement used in restraint of trade in violation of the antitrust laws. (N.T. 1060 [R. 1071a]). In response to a question from the jury these instructions were again repeated at pages 1094-1102 [R. 1105a-1113a]. The jury came back a second time and asked to have the United States Supreme Court decision read to it and the matter was again gone into at page 1114 [R. 1125a].

3. *Itemization of Damages.*

In the original motion, complaint was made that the court erred in allowing the jury to take with it a tabulation of damages claimed by the plaintiffs. It will be noted that plaintiff's evidence indicated that the damages were $260,000 for violation of the antitrust laws whereas the jury only returned a verdict of $125,000 thus indicating that they reviewed this matter very carefully. Sending out of tabulations or itemizations of damages claimed with

cautionary instructions as here that they are only for the guidance of the jury and the jury is to make its own determination is certainly not improper. Shane v. Warner Mfg. Corp., 229 F 2d 207 (3d cir 1956).

Defendants in their original Motion For Judgment Notwithstanding the Verdict or For New Trial filed December 27, 1971, alleged six reasons most of which we have covered heretofore in this opinion. On February 23, 1972, twenty seven additional reasons in support of defendant's Motion for Directed Verdict or for New Trial were filed. None of these additional reasons were briefed or argued at time of argument. It has been held that the court is not required to examine all of the grounds for a new trial set forth in the motion but which are not set out or argued in a brief or argument. Clay v. Southern Rwy Co., 284 F 2d 152 (5th cir 1960). In the absence of argument or brief disclosing to the trial judge exactly why the defendants believe they are entitled to a new trial for these additional reasons, we do not believe that he is required to research by himself and then conclude what arguments could be advanced for or against the additional reasons for new trial. We will say that we have examined the reasons advanced in detail which were neither briefed nor argued and do not consider them to be of sufficient merit to warrant further discussion in this opinion. For all of the above reasons, the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial will be denied.

Order

And Now, to wit, August 10, 1972, after consideration of defendants' Motion for Judgment in accordance with Motion for Directed Verdict and for New Trial and after briefs and argument and reargument of counsel,

It Is Ordered that said motions be and they hereby are denied.

/s/ William W. Knox
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1937

SOLAR FUEL COMPANY, A PENNSYLVANIA CORPORATION,
AND PAUL SCHRECKENGOST,
PLAINTIFFS-APPELLEES,

v.

UNITED MINE WORKERS OF AMERICA AND
UNITED MINE WORKERS OF AMERICA,
DISTRICT NO. 2,
DEFENDANTS-APPELLANTS.
(WESTERN DISTRICT OF PENNA.—CIVIL ACTION NO. 69-27)

ARGUED JUNE 5, 1973

BEFORE SEITZ, CHIEF JUDGE, STALEY AND HUNTER,
CIRCUIT JUDGES.

Judgment Order

After considering the contentions of the appellants, and finding such contentions without merit, it is

ORDERED AND ADJUDGED that the judgment of the district court is hereby affirmed. Costs taxed against appellants.

By the Court,

/s/ COLLINS J. SEITZ
Chief Judge

Attest:

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

DATED: July 6, 1973

APPENDIX D

15 U.S.C. § 1 (Section 1 of the Sherman Act):

Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine

not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 17 (Section 6 of the Clayton Act):

Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1255

INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA AND DISTRICT No. 2, UNITED MINE WORKERS OF AMERICA,
Petitioners,

v.

SOLAR FUEL COMPANY AND PAUL SCHRECKENGOST,
Respondents.

BRIEF OF RESPONDENT, SOLAR FUEL COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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RECORD BELOW

Relevant portions of the District Court's charge to the jury and of colloquies of court and counsel are appended to this Brief (Appendix 1, pp. 1a-13a infra).[1]

Relevant portions of the testimony in the District Court are appended to this Brief (Appendix 2, pp. 15a-18a infra).

[1] The United States District Court for the Western District of Pennsylvania, District Judge William W. Knox presiding, is referred to as "District Court". The United States Court of Appeals for the Third Circuit is referred to as "Third Circuit". The United States Court of Appeals for the Sixth Circuit is referred to as "Sixth Circuit". "R" will hereinafter refer to the Appendix for Appellants filed in the Third Circuit below. "A" will refer to the Appendices in the Petition for Certiorari in opposition to which this Brief is filed. "AA" will refer to the Appendices to this Brief.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Respondent does not accept the statement of Questions Presented as set forth in the Petition (p. 2). In lieu thereof, respondent submits the following:

> Where the contention in the courts below was focused on a factual issue, the Court of Appeals affirmed without opinion and the District Court charged the jury in accordance with applicable decisions of this Court, should certiorari be granted?

COUNTER-STATEMENT OF THE CASE

The National Bituminous Coal Wage Agreement of 1950 as Amended Effective December 1, 1958 (NBCWA) between Petitioner, United Mine Workers of America (UMW) and Bituminous Coal Operators' Association (BCOA) *et al*, contained what was entitled "Protective Wage Clause" (PWC) reading in pertinent part: (Exhibit 208; R. 46a-47a; 1191a-1192a) (AA 15a)

> "PROTECTIVE WAGE CLAUSE
>
> The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that Bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows:
>
> A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party

to, not will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

B. It is recognized that when signatory operators mine, prepare, or procure or acquire under subcontract arrangements, bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract".

Respondent, Solar Fuel Company, was a signatory to NBCWA by virtue of its membership in 1958 in the signatory Somerset County Coal Operators' Association. Later, in 1961-2, it withdrew from membership in that Association (A. p. 10a-11a; R. 97a-102a).

On July 17, 1967 UMW instituted a strike against Solar Fuel Company which continued through 1967 and 1968 (R. 43a).

From the night of July 17, 1967 through the year 1968 the mines of Solar Fuel Company were picketed by the Petitioners who, through their organizers, officers, agents, members and/or employees, attempted to cause Solar Fuel Company to enter into a contract with Petitioners in the same

form as the National Bituminous Coal Wage Agreement of 1950 as amended (R. 43a-44a; 1063a-4a; AA 3a; 15a).

In the course of this strike there was extreme violence even to the extent on some occasions of endangering life. Mine vehicles were burned and run off cliffs. Mine buildings and equipment were burned and otherwise destroyed and damaged. Loads of coal were dumped on a road giving access to one of the mines. The roads were strewn with large nails inserted through bottle caps so as to puncture the tires of any vehicles passing. Explosives were thrown and some people were set upon by mobs of 50 or 100 people and beaten and kicked. An injunction issued by the Court of Common Pleas of Somerset County, Pennsylvania, limiting the number of pickets in an attempt to stop the violence was ignored and at times pickets in the number of 800 or 1,000 assembled on the roads leading to the mines, the groups being so great as to overwhelm the State Police who came to the assistance of the sheriff in attempting to enforce the injunction. The judge issuing the injunction was defied in his courtroom by one of the officers of the international union who told him that the next day the pickets would be out in even greater numbers. These acts were fomented, encouraged, condoned or ratified by officers and representatives of the Unions who did nothing to control the actions of the mobs or to discipline the union members involved although the evidence shows these officials and representatives were present on the picket line. Mr. Jock Yablonski, since murdered, throughout the course of negotiations insisted that Solar Fuel Company had to accede and submit to the terms of the National Bituminous Coal Wage Agreement of 1950 as amended and pay the royalties due per ton of coal and the Union throughout the negotiations insisted that it was without power to negotiate a Contract on any other terms because of the PWC (A. 11a-12a).

The Petitioner Unions attempted to force the National Bituminous Coal Wage Agreement of 1950 as amended upon Solar Fuel Company despite its alleged ruinous effect upon that company and the Union officials, both District and International, refused to negotiate with Solar Fuel Company on any terms other than the National Contract (A. 22a).

Effective October 1, 1968 National Bituminous Coal Wage Agreement of 1968 was entered into between UMW and the Coal Operators (Exhibit 209, R. 1211a; 47a; AA 16a).

In December, 1968 the Unions indicated to Solar Fuel Company's negotiators that at that time there were changes made in the Contract that would permit some latitude in bargaining on some points and that because of the new language in the new Agreement the negotiators of the Unions were allowed to negotiate a contract different from that of the National Contract (R. 625a-627a; 632a-635a; AA 16a-18a).

In January, 1969 Solar Fuel Company filed this action in the District Court claiming damages under Section 4 of the *Clayton Act*, 15 U.S.C. 15 for violation of Section 1 of the *Sherman Act*, 15 U.S.C. 1, and damages for destruction of real estate and personal property as a pendent state cause of action under Pennsylvania Law.

In successive charges to the jury the District Court gave instructions three times almost *ipsissimis verbis* and a fourth time in summary form.

In its first instructions to the jury, the District Court charged:

> The defendants are labor organizations and many years ago Congress decided, as a matter of public policy, that workers are free to engage in association, organization and designation of representatives to negotiate the terms and conditions of employment free from

interference, restraint or coercion of employers and to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection and the Courts in the United States are forbidden to issue orders in labor disputes where the Union is proceeding peaceably to accomplish its legitimate ends. Now this brings us to the problem of whether the Unions in this case can be held liable for violating the anti-trust laws (R. 1067a; AA pp. 3a-4a).

We have before us the National Bituminous Coal Wage Agreement of 1950 which was in effect at the time of the events we are concerned with in 1967 and 1968. Certain language contained in this Agreement has caused some difficulty as to whether the Agreement goes beyond legitimate efforts of a labor organization to secure better wages and working conditions for its members and becomes an Agreement in restraint of trade and violation of the Sherman Anti-Trust Act (R. 1067a-1068a; AA p. 4a).

It appears that Solar Fuel Company was originally a signatory to the Amendment of December 1, 1958 which contained the PWC but subsequently withdrew (R. 1068a-1069a; AA p. 4a).

The United States Supreme Court, with reference to this matter, has said that a Union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own Union interests seek to obtain the same terms from other employers. No case under the Anti-Trust laws could be made out on evidence limited to such Union behavior but a Union forfeits its exemption from the Anti-Trust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors in the industry and the Union is liable with the employers, if it is true, even though the Union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. (R. 1069a; AA p. 5a).

If the language of the PWC amounts to an agreement by the United Mine Workers with the major coal operators to impose the conditions of the national contract upon small operators to the latter's damage then the Union can be held liable for violation of the Anti-Trust laws (R. 1069a-1070a; A. 1a).

There is in this case no direct evidence, other than the language of the Contract itself, of using this Agreement as a device for this illegal purpose, to impose these terms on small operators for the purpose of ruining them but, on the other hand, it does appear that the Union, by the use of this language on its face, has disabled itself from negotiating other and less burdensome terms with other operators, whether signatories or not signatories to the Agreement. Solar Fuel was a party and signatory to this Agreement and then withdrew (R. 1070a; A. 1a-2a).

The Union allegedly called the strike for the purpose of imposing the terms of the National Agreement upon Solar Fuel Company (R. 1070a; A. p. 2a).

There is a sharp conflict in the evidence about the course of these negotiations. Solar's witnesses tell you that the Union negotiators, including Mr. Yablonski, who is now deceased, insisted throughout that Solar sign the National Agreement without any exceptions (R. 1070a; A. 2a).

The evidence on behalf of the Union, however, is that Mr. Yablonski indicated that he had authority to negotiate any or all terms of the National Agreement. It appears particularly that Solar objected to the payment of 40¢ per ton for the miner's welfare and retirement fund required by the 1964 Amendment to the National Agreement and also objected to the Union shop provisions. The company's testimony is that the Union changed its approach after the 1968 Agreement was signed and indicated in the fall of 1968 that they were willing to negotiate other terms R. 1071a; A. 2a).

If you believe Solar's testimony that the Union throughout, refused to negotiate any of the terms of the National Agreement as a result of having been

disabled by the so-called Protective Wage Clause, part of which I have read to you, and that the Union insisted upon these terms and no others as a result of these provisions of the Contract, then you would be justified in finding that the Union was a party to the Agreement used in restraint of trade in violation of the Anti-Trust laws and you would be justified in finding for the plaintiffs in this Anti-Trust matter. You would also be justified in finding damages for the plaintiffs as parties who were injured by such an agreement and the attempted enforcement of it (R. 1071a; A. 2a-3a).

If, on the other hand, you find that the defendants' evidence is correct, and that the Union did not insist upon these terms and no others, then you should find for the defendants with respect to the Anti-Trust claims in this suit because they have not used this Contract, regardless of what it says, as a Contract in restraint of trade (R. 1072; A. 3a).

After the jury had deliberated for some time it requested the Court to repeat its instructions in regard to violation of the Anti-Trust laws and the District Court then charged as follows:

We have before us the National Bituminous Wage Coal Agreement of 1950 which was in effect at the time of the events we are concerned with in 1967 and 1968. Certain language contained in this Agreement has caused considerable dispute in the Courts and some difficulty as to whether the Agreement here goes beyond legitimate efforts of a labor organization to secure better wages and working conditions for its members and becomes an agreement in restraint of trade in violation of the Sherman Act Anti-Trust Act (R. 1108a; AA 5a-6a).

A Union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own Union interests, seek to obtain the same terms from other employers. No case under the Anti-Trust Laws could be made on evidence limited to such Union behavior but a Union forfeits its exemption from the Anti-Trust laws when it is clearly shown that it has

agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the Union is liable with the employers if it is true even though the Union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry (R. 1109a-1110a; AA. 6a).

If this language amounts to an agreement by the United Mine Workers with the major coal operators to impose conditions of the National Contract upon smaller operators to the latter's damage, then the Union would be liable for violation of the Anti-Trust Laws (R. 1110a; AA. 7a).

There is in this case no direct evidence other than the language of the Contract itself of using this Agreement as a device for this illegal purpose, to impose these terms on small operators for the purpose of ruining them but, on the other hand, it does appear that the Union by the use of this language on its face has disabled itself from negotiating other and less burdensome terms with other operators not signatories of the Agreement. Solar Fuel Company was originally a signatory of the Agreement and later canceled its membership in the Somerset Coal Operators' Association in an attempt to withdraw from it but it was a signatory to the Agreement as originally set forth (R. 1110a-1111a; A. 5a; AA 7a).

You will recall the testimony that Solar Fuel was a party and signatory to this Agreement and then withdrew and later on the Union allegedly called the strike for the purpose of imposing the terms of the National Agreement upon Solar (R. 1111a; AA 7a).

There is a sharp conflict in the evidence about the course of these negotiations. Plaintiffs' witnesses tell you that the Union negotiators, including Mr. Yablonski, who it appears is now deceased, insisted throughout that Solar signed the National Agreement without any exceptions. The evidence on behalf of the Union, however, is that Mr. Yablonski indicated that he had authority to negotiate any or all terms of the National

Agreement. It appears particularly that Solar objected to the payment of 40¢ per ton for the miner's welfare and retirement fund required by the 1964 Amendment of the National Agreement and also objected to the Union shop provisions. The company's testimony is that the Union changed its approach after the 1968 Agreement was signed and indicated in the Fall of 1968 that they were willing to negotiate other terms (R. 1111a-1112a; AA 7a-8a).

If you believe Solar's testimony to the effect that the Union refused to negotiate any of the terms of the National Agreement as a result of having been disabled by the so-called Protective Wage Clause, part of which I read to you, and that the Union insisted upon these terms and no others as a result of these provisions of the Contract, then you would be justified in finding the Union was party to the Agreement in restraint of trade in violation of the Anti-Trust laws and you would be justified in finding for the plaintiffs as parties injured by such Agreement. If, on the other hand, you find the defendants' evidence is correct and the Union did not insist on these terms and no others, then you should find for the defendants with respect to the Anti-Trust claims (R. 1112a; A. 5a).

I will not recount here the numerous acts of which the defendants and their agents and their members are accused but it will be sufficient for me to say that you must find that any damages sustained by plaintiffs from these acts of misconduct, if you find the charge is true, must be found to have resulted from and form a part of an illegal attempt to enforce this Agreement and all its terms upon Solar Fuel Company (R. 1113a; A. 8a).

That is the factual question which I am leaving to you to determine, whether the United Mine Workers endeavored to use this Agreement, as written, for the purpose of enforcing an illegal contract, to force these terms on all employers, or whether, even though they were bound by this Agreement, the United Mine Workers nevertheless did not attempt to enforce it on Solar in this case. That is a question you will have to determine (R. 1113a; A. 5a-6a).

After further deliberation the jury again asked for further instructions. Specifically they asked the District Court to further explain the U. S. Supreme Court's decision to which the District Court had twice previously adverted in his charges (R. 1125a; A. 6a-7a; AA 10a).

At that point the District Court further charged the jury as follows:

> I read to you as part of the charge some language from the decision of United States Supreme Court in the case of United Mine Workers against Penington, 381 U.S. Reports, page 657 in which the Court said: A Union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own Union interests, seek to obtain the same terms from other employers. No case under the Anti-Trust laws could be made out on evidence limited to such Union behavior but we think the Union forfeits its exemption from the Anti-Trust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the Union is liable with the employers, if it is true, even though the Union's part in the scheme is an undertaking to obtain the same wages, hours or other conditions of employment from the remaining employers in the industry (R. 1126a; AA 10a).
>
> I further told you that there was no direct evidence in this case of any actual agreement between the UMW and the coal operators to accomplish this purpose. We have no evidence in this case of that but we do have evidence that the Union insisted that they had to have this contract, with no other words added to it, it had to be this contract or nothing, these terms or nothing, and that they were doing that as a result of that clause which you have seen in the Agreement and if you find that is true, that they were using this contract for that purpose, then you could find that they were participating in a restraint of trade under the Sherman Anti-Trust Act because they have disabled themselves from

negotiating any other terms with Solar who was a signatory at the time the original clause was entered into. Now, if on the other hand, they did not do that but, in this particular case, decided to vary from the terms of the National Contract, as has been testified Mr. Yablonski said, and it was said several times, if that evidence is true then the United Mine Workers are not using this contract as an instrument to impose the terms on a small company like Solar so as to help out the large competitors which is what the Supreme Court is obviously worried about (R. 1126a-1127a; AA 10a-11a).

We all know that a Union has a right to bargain and to use its best efforts to secure better wages and working conditions for its members that is what it is for and it is protected in this right under the law and as long as it is doing that on its own we have no criticism of it but yet, on the other hand, if part of the Agreement with the coal operators is to force higher wages and difficult working conditions on the smaller operators which they can't meet and the Union is engaged in that and was doing that in this very situation with Solar Fuel, using this contract for that purpose then you are permitted to find a violation of the Anti-Trust laws (R. 1127a-1128a: AA 11a).

The United States Supreme Court will not permit a Union to agree with a group of employers that they are going to use the wages set forth in the National Contract for the purpose of driving small competitors out of business. Beyond that I don't think I can do anything to help you. It is a factual question in this case whether the Union did do anything like that and you have testimony which is diametrically opposed and you have to resolve that conflict. That is what jurors are for (R. 1128a-1129a; AA 12a).

The jury then resumed its deliberations but in a very few minutes returned and the following final colloquy took place in open court between the jury and the District Court:

The foreman of the jury addressed the Court stating that the jury had sat there three times listening to the charge but were confused as to whether or not they could use the Protective Wage Clause (R. 1130a; AA 12a).

The District Court replied that the jury should consider the Protective Wage Clause in the light of the actions, the demands made by the Union, if those demands were made, if they said they couldn't veer from this Agreement (R. 1130a-1131a; AA 12a).

Juror No. 4 then asked the Court if it was not correct that the Protective Wage Clause was not illegal by itself unless there was corroborating evidence that they used it for imposing the National Agreement on Solar Fuel Company (R. 1131a; AA 13a).

To this question the District Court answered that if they used it in this case against Solar Fuel, if they said in the beginning, we will negotiate on any terms you want then they have not used that Agreement as an instrument to violate the Anti-Trust laws and you cannot find such violation but if they did use it in this case then you would be justified in making such a finding (R. 1131a; AA 13a).

The jury returned its verdict in favor of Solar Fuel Company for violation of the Anti-Trust laws (R. 1132a-1133a; A. 3a).

The jury found no damages for the other plaintiff, Schreckengost, for violation of the Anti-Trust laws. It also brought in verdicts for both plaintiffs on the pendent jurisdiction claims under the Pennsylvania State law (R. 1132a-1133a).

After judgments entered, the District Court entered an Order denying Petitioners' post-trial motions and filed an Opinion in support of that Order (R. 1147a-1166a; A. 10a-26a).

In this Opinion the District Court held:

1. The PWC was in effect in the years 1967-1968 until expressly rescinded by the NBCWA of 1968 effective October 1, 1968. The Union claims that this clause was wiped out and rescinded by the amendments of 1964. There is no evidence that the PWC contained in the 1958 amendment was terminated by the 1964 amendment and we have concluded that as a matter of fact it was not terminated until the 1968 agreement effective October 1, 1968 (R. 1153a-1156a; A. 16a-18a).

2. Nowhere was this issue of rescission of the PWC in 1964 raised in the pleadings, in the pre-trial narratives, at the pre-trial conference or during the trial itself (R. 1157a-1158a; A. 20a). To permit this new theory to be injected at the close of the case would completely undermine the integrity and effectiveness of the pre-trial procedures and pre-trial order in this case (R. 1159a; A. 21a).

3. The great weight of the evidence indicated that the defendants had attempted to force this contract upon Solar despite its alleged ruinous effect upon plaintiff and that the Union officials, both District and International, had refused to negotiate with plaintiff on any terms other than the national contract (R. 1161a; A. 22a).

4. The jury was told that labor unions generally were exempt from the Anti-Trust laws and were free to pursue their legitimate ends in securing better wages and working conditions for their members without being held liable under the Anti-Trust laws and that the crucial point in this case was whether under these circumstances the agreements were in violation of these laws and whether the Protective Wage Clause as sought to be enforced by the Unions in this case had become and was used as an agreement in restraint of trade in violation of the Sherman Act the purpose of which had been explained to the jury (R. 1163a; A. 24a).

On appeal the Third Circuit ordered and adjudged that the judgment of the District Court was affirmed without opinion (A. 27a).

ARGUMENT

There is no substantial Federal question presented.

A.

Until this point in the case the focus of contention has been on the fact question whether PWC was in effect in 1967-1968.

At all times in this case prior to this Petition for Certiorari the arguments of the parties have been focused on the question of fact whether PWC was in effect in 1967 and 1968 at the time of the events involved. No contention on this point was advanced by the Unions before or at the trial of this case but this issue has been the cynosure beginning with the Union's post-trial motions in the District Court and continuing in the Third Circuit.

That is true by Petitioner's own admissions.

The oral argument in this case before the Third Circuit was described as follows by Petitioners at page 3 of their Petition for Rehearing *En Banc* filed in that Court:

> "Oral argument in this case was focused on a single question: whether the PWC remained in effect in 1967 and 1968 or whether it was dropped from the NBCWA in 1964."

In another case Petitioner, United Mine Workers of America, has referred to "the issue in Solar[2] of whether PWC was repealed by the 1964 amendment to the National Agreement" and stated that the District Court's "reasons for rejection of the issue of PWC's prior rescission was that its injection 'came too late' since it was not raised in

[2] This case in the District Court and in the Third Circuit.

pleadings, in pre-trial narrative statements, at pre-trial conference or during the trial".[3]

Certiorari is not granted "to review evidence and discuss specific facts": *U. S. vs. Johnston*, 268 U.S. 200, 227.

B.

The District Court correctly charged the jury as to the liability of the Unions, for violation of the Anti-Trust laws.

The District Court held that its charge to the jury as to the liability of the Union for violation of the Anti-Trust laws was in conformity with the requirements of *UMW vs. Pennington*, 381 U.S. 657 and *Ramsey vs. UMW*, 401 U.S. 302 (A. 23a-25a).

In this conclusion the District Court was correct.

Three times it charged the jury as to the rule of *UMW vs. Pennington:* (R. 1067a-1069a; AA 3a, 5a; R. 1069a-1072a; A. 1a-3a) (R. 1108a-1110a; AA 5a-7a; R. 1110a-1111a; A. 5a; R. 1111a-1112a; AA 7a-8a; R. 1112a; A. 5a; R. 1113a; AA 8a; R. 1113a; A. 5a-6a) (R. 1125a-1129a; AA 10a-12a).

Further, the District Court repeated the same matter in summary form in reply to questions of the foreman of the jury and juror No. 4 (R. 1130a-1131a; AA 12a-13a).

The instructions as thus given were in strict accord with the requirements of the cases.

In *Pennington it was held* (381 U.S. 664-669):

> "We have said that a union may make wage agreements with a multi-employer bargaining unit and may

[3] George Ramsey, et al. vs. United Mine Workers of America, No. 73-503 in the Supreme Court of the United States, October Term, 1973, Brief of Respondent, United Mine Workers of America in Opposition to Petition for Writ of Certiorari, p. 39. Certiorari denied December 3, 1973, 42 U.S. L.W. 3326.

> in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.
>
> • • •
>
> Thus *the relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws*".

In *Ramsey* we find the same thing in different words (401 U.S., 313):

> "Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed upon conduct."

The District Court strove mightily to make the law as thus stated clear to the jury and read to that jury the language of *Pennington* by chapter and verse (R. 1126a; AA 10a).

In *South East Coal Company v. United Mine Workers of America*, 434 Fed. 2d 767 (1970) (Certiorari denied, 402 U.S. 983) the Sixth Circuit summarized *Ramsey* and *Pennington*, as applied to the Protective Wage Clause, as follows (p. 782):

> "Reviewing the Ramsey decision's interpretation of Pennington, four conclusions may be drawn applicable to the present dispute. First, the National Agreement containing the Protective Wage Clause is, on its face a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. Second, if this agreement was made or entered into by the union in pursuance of its own self interests, there are no grounds for concluding a violation of the antitrust laws. Third, if, however, the employers and union entered into this contract with the conscious knowledge or intent that it would be used to drive competitors out of business (more than the incidental effects caused by the adoption of a uniform wage agreement which may result in certain operators not being able to function profitably), then a violation of the antitrust laws has occurred. Fourth, it is this either expressly or impliedly agreed upon use of the valid contract, that is, that it will be used to drive competitors out of business, that comprises the agreement or conspiracy which is illegal for purposes of the antitrust laws".

We submit that the charge of the District Court was also correct according to the interpretation thus placed upon PWC by the Sixth Circuit.

In addition, we believe that the District Court's charge was also proper because the correct construction of PWC is that it is itself an illegal bargain for which the Union is not exempt under the Anti-Trust laws.

By 1958 when PWC was first agreed to by the Union and the BCOA, *et al.*, the Union had executed the National Contract with many different bargaining units in addition to those represented by BCOA. The National Bituminous Coal Wage Agreement of 1950, with is many signatories (R. 1167a) had been followed by the National Bituminous Coal Wage Agreement of 1950 as amended January 18, 1951 (R. 1167a), the National Bituminous Coal Wage

Agreement of 1950 as amended September 29, 1952 (R. 1179a), the National Bituminous Coal Wage Agreement of 1950 as amended effective September 1, 1955 (R. 1183a), and the National Bituminous Coal Wage Agreement of 1950 as amended effective October 1, 1956 (R. 1187a). Each of these successive amendments had its numerous signatories (R. 1175a-1176a; 1178a; 1182a; 1186a and 1190a). Somerset County Coal Operators' Association of which Solar Fuel Company was a member had signed all of these prior forms of the National Bituminous Coal Wage Agreement of 1950 (Same R. references as in previous sentence).

When the PWC was signed in December, 1958 and when Solar Fuel Company became a signatory thereto through Somerset County Coal Operators' Association, the effect of PWC was to bind the Union to the same contract with many and different bargaining units. Even if PWC bound the Union only to insist upon identical contract terms as against "signatories" the Union was no longer free to agree to different terms with any previous signatory to the National Bituminous Coal Wage Agreement and Solar Fuel Company was such a previous signatory.

C.

The asserted conflict between the Third and Sixth Circuits does not exist.

UMW asserts that there is a conflict between the decision of the Third Circuit in this *Solar* case and that of the Sixth Circuit in *Ramsey* (481 F. 2d 742, cert. denied 42 U.S. L.W. 3326 (1973)).

By UMW's own admission in its Brief in opposition to the granting of certiorari in Ramsey no such conflict exists. At page 39 of that Brief UMW stated:[4]

[4] See footnote 3, at page 16, supra.

"There Is No Conflict Between The Sixth Circuit Majority's Holding And The Third Circuit's Solar Fuel Case

Petitioner's claim of a conflict between the Sixth Circuit majority's holding and that of the Third Circuit in Solar Fuel Co. v. UMW, 478 F. 2d 1401 (July 6, 1973) has no merit.

An initial observation is that factually, as to PWC, Solar is wholly disparate from the instant Ramsey case: the issue in Solar of whether PWC was repealed by the 1964 amendment to the National Agreement is not an issue in the instant Ramsey case; the district court's Solar opinion is wholly devoid of uncontradicted testimony found in Ramsey relating to PWC's background (ante, pp. 9-12); and its reasons for rejection of the issue of PWC's prior rescission was that its injection 'came too late' since it was not raised in pleadings, in pre-trial narrative statements, at pre-trial conference or during the trial."

CONCLUSION

For the reasons herein discussed Solar Fuel Company, respondent, respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN A. METZ, JR.,
HENRY G. BEAMER, III,
Counsel for Respondent,
Solar Fuel Company.

(In Chambers)

MR. LIVINGSTON: Your Honor, do you treat, in your charge, the discussion of the P.W.C.?

THE COURT: Yes.

MR. LIVINGSTON: Okay. (R. 1052a)

(In Chambers)

MR. LIVINGSTON: John, wait a minute. I have a problem here. My problems are always creating doubt in my mind. It just seems to me, in this particular case, that it should not be left to a jury but should be a question of law and directed as such as to whether or not the union is bound by the provisions of the P.W.C. in dealing with Solar Fuel Company. Now, the reason for the inquiry is that I disagree vigorously with Mr. Metz' interpretation of the P.W.C. as it applies to Solar Fuel. I have no quarrel or problem with Mr. Metz indicating his feelings to the jury, but it is my judgment that, as a matter of law, the restrictions imposed on the negotiations by the P.W.C. do not apply to the Solar Fuel Company by the very language of the—of that section of the P.W.C. set forth in the first paragraph in Mr. Justice White's opinion in Ramsey against the United Mine Workers, and that is the language that provides, "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable district contract. The United Mine Workers of America will diligently perform and enforce, without discrimination or favor, the conditions of this paragraph and all other terms and conditions of this contract and will use and exercise its

continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto." I have two problems with that in light of Mr. Metz' interpretation of it. If Solar Fuel was a signatory in the 1958 contract, if, indeed, they were a signatory, and I doubt that they were, but the period of the contract was that period from '58 to '59, and, during that period, there might have been a restriction on the dealing—

THE COURT: No, it was extended by the amendments.

MR. LIVINGSTON: But they were not a party to the contract as extended by the amendments. They were finished with this in any degree by simply resigning from an organization that was a signatory to it.

MR. METZ: Well, of course, they were still a signatory at that time.

MR. LIVINGSTON: In '58.

THE COURT: That's right.

MR. LIVINGSTON: But I am saying this, Your Honor, that, during the period of this contract, there were restrictions put upon the United Mine Workers, and the period of that contract was not 1967-68.

THE COURT: No. I am ruling this applied to Solar Fuel as a signatory. However, I am leaving to the jury whether the United Mine Workers did, as a matter of fact, try to enforce this. That is a matter of fact for the jury because of the sharp contradiction between what Mr. Berkey said and Mr. Lease and others said.

MR. LIVINGSTON: And, also, there is a question of whether or not the contract was an agreement, in fact, in restraint of trade or an attempt by the mine workers to represent their membership.

THE COURT: I am saying it is not a restraint of trade unless it was attempted to be enforced.

MR. LIVINGSTON: And even if attempted to be enforced, it is not, in effect, a restraint of trade.

THE COURT: Well, that may be, but I am ruling that it is.

MR. LIVINGSTON: Okay. I just wanted a ruling, Your Honor.

THE COURT: Very well, that is your ruling. (R. 1053a-1055a)

(Instructions to Jury)

It has also been stipulated that the officers of District No. 2 are appointed by the International Union, the United Mine Workers of America, and that the union, on July 17, 1967, instituted the strike against the plaintiff, Solar, and that they attempted to cause the plaintiff, Solar Fuel Company, to enter into a contract with the defendants in the same form as the National Bituminous Coal Wage Agreement of 1950, as Amended, and that the defendants were also attempting to make Solar's employees join plaintiff unions —defendant unions. This agreement, which is important to this case, will be given to you. It is Exhibit No. 208. (R. 1063a-1064a)

(Instructions to Jury)

We must say to you, however, that the defendants in this case are labor organizations, and, many years ago, Congress decided, as a matter of public policy, that workers are free to engage in association, organization and designation of representatives to negotiate the terms and conditions of employment free from interference, restraint or coercion of employers and to engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection, and the courts in the United States are forbidden to issue orders in labor disputes where the union

is proceeding peacefully to accomplish its legitimate ends. Now, this brings us to the problem as to whether the unions in this case can be held liable for violating the antitrust laws.

Now, we have before us this Exhibit 208, the National Bituminous Coal Wage Agreement of 1950, which was in effect at the time of the events we are concerned with in 1967 and 1968. Certain language contained in this agreement, as amended, has caused considerable dispute in the courts and has even caused the Supreme Court of the United States some difficulty as to whether the agreement goes beyond legitimate efforts of a labor organization to secure better wages and working conditions for its members and becomes an agreement in restraint of trade in violation of the Sherman Antitrust Act. The language in question is contained on page two of the amendment of December 1, 1958, which reads as follows: "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable district contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all parties signatory thereto."

It appears that Solar Fuel Company, at the time, was a member of the—one of the coal associations which operated —which signed this contract. It was originally a signatory thereto, although they later withdrew.

Now, the United States Supreme Court, with reference to this matter, has said that "A union may make wage agreements with a multi-employer bargaining unit"—that is the coal operators—"and may, in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior, but we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it is true, even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry. Thus, the relevant labor and antitrust policies compel us to conclude that the alleged agreement between the U.M.W. and large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws." (R. 1067a-1069a)

(Instructions to Jury)

We have before us Exhibit 208, the National Bituminous Wage and Coal Agreement of 1950, which was in effect at the time of the events we are concerned with in 1967 and '68. Certain language contained in this agreement, as amended, has caused considerable dispute in the courts and has even caused the Supreme Court of the United States some difficulty as to whether the agreement here goes beyond legitimate efforts of a labor organization to secure better wages and working conditions for its members and becomes an agreement in restraint of trade in violation of the Sher-

man Antitrust Act. The language in question is contained on page two of the amendment of December 1, 1958, which reads as follows: I am quoting from paragraph A at the top of page two of that amendment. I think it is marked for you. I think you will read it, but I will repeat it again.

"During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable district contract. The United Mine Workers of America will diligently perform and enforce, without discrimination or favor, the conditions of this paragraph and all other terms and conditions of this contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto." The United States Supreme Court, with respect to this contract has held—and I am quoting from the United States Supreme Court decision—"A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of it own union interests, seek to obtain the same terms from other employers. No case under the antitrust laws could be made on evidence limited to such union behavior, but we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it is true, even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. Thus, the relevant

labor and antitrust policies compel us to conclude that the alleged agreement between U.M.W. and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws."

I emphasize the words "if proved."

Now, in other words, if this language amounts to an agreement by the United Mine Workers with the major coal operators to impose the conditions of the national contract upon smaller operators to the latter's damage, then the union would be liable for violation of the antitrust laws. (R. 1108a-1110a)

(Instructions to Jury)

Now, as to that, I told you later that it appeared that Solar Fuel Company was, originally, a signatory of the agreement and had later cancelled its membership in the Somerset Coal Operators Association in an attempt to withdraw from it, but it was a signatory to the agreement as originally set forth.

You will recall the testimony that Solar Fuel, a family organization, was a party and signatory to this agreement and then withdrew and, later on, an election was held, and, after deciding contested ballots, the NLRB determined to certify the United Mine Workers as the bargaining agent for Solar employees, but Solar, nevertheless, refused to bargain, for reasons which were discussed by Mr. Berkey, and the union allegedly called the strike for the purpose of imposing the terms of the national agreement upon plaintiff, Solar.

You will recall that there is a sharp conflict in the evidence about the course of these negotiations. Plaintiffs' witnesses tell you that the union negotiators, including Mr. Yablonski,

who it appears is now deceased, insisted throughout that Solar sign the national agreement without any exceptions. The evidence on behalf of the union, however, is that Mr. Yablonski indicated that he had authority to negotiate any or all terms of the national agreement. It appears, particularly, that the plaintiff, Solar, objected to the payment of 40 cents per ton for the miners' welfare and retirement fund, required on page two of the 1964 amendment to the national agreement, and also objected to the union shop provisions. You will recall the company's testimony is that the union changed its approach after the 1968 agreement was signed, which was before execution of that amendment, Exhibit 209, and indicated, in the fall of 1968, that they were willing to negotiate other terms (R. 1111a-1112a).

(Instructions to Jury)

I will not recount, here, the numerous acts of which the defendants and their agents and their members are accused, but it will be sufficient for me to say that you must find that any damages sustained by plaintiffs from these acts of misconduct, if you find the charge is true, must be found to have resulted from and form a part of an illegal attempt to enforce this agreement and all its terms upon plaintiff, Solar Fuel Company (R. 1113a).

(In Chambers)

MR. METZ: But what they are asking for is about the Supreme Court decision.

THE COURT: I will see if there is anything further in here that would enlighten them any more about that. There is one other paragraph; I think it is only going to confuse them further.

"On the other hand, the policy of the antitrust laws is clearly set against the employer-union agreements seeking

to prescribe labor standards outside the bargaining unit. One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another. The Anti-competitive potential of such a combination is obvious, but it is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry. And if the conspiracy presently under attack were declared exempt, it would hardly be possible to deny exemption to such avowedly discriminatory schemes."

MR. METZ: That would suit me fine if you would read that to the jury.

THE COURT: I think that will serve to confuse matters. I think I will read this to them again, if this was only to better their wages and working conditions of their members, it is all right. If, on the other hand, they are doing this as part of a combination with employers to serve the ulterior purposes—the word "predatory" is used in here—of the employers, they are not protected, and, if they find that the union in this case did actually use this contract—

MR. METZ: Or try to use it.

THE COURT: Or try to use it for this purpose, then they could find a violation of the antitrust laws. On the other hand, if they find the union did not use this contract for this purpose in this case, they cannot find liability (R. 1120a-1121a).

(The following proceedings took place in open court.)

THE COURT: Members of the jury, you have submitted a further question: "We would like to have the Court further explain to us the U.S. Supreme Court decision in regard to paragraph A of the Protective Wage Clause as Amended, effective December 1, 1958, of the National Bituminous Coal Wage Agreement of 1950."

I read to you, as part of the charge, members of the jury, some language from the decision of the United States Supreme Court in the case of United Mine Workers against Pennington, 381 U.S. Reports, page 657, in which the Court said, "A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own union interest, seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior, but we think the union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it is true, even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. Thus, the relevant labor and antitrust policies compel us to conclude that the alleged agreement between U.M.W. and the large operators to secure the uniform labor standards throughout the industry, if proved"—you will recall I emphasized those two words, if proved—"was not exempt from the antitrust laws."

Now, I further told you there was no direct evidence in this case of any actual agreement between the U.M.W. and the coal operators to accomplish this purpose. We have no

evidence in this case of that, but we do have evidence that the union insisted that they had to have this contract, with no other words added to it, it had to be this contract or nothing, these terms or nothing, and that they were doing that as a result of that clause which you have seen in the agreement, and, if they—and if you find that is true, that they were using this contract for that purpose, then you could find that they were participating in a restraint of trade under the Sherman Antitrust Act because they have disabled themselves from negotiating any other terms with Solar, who was a signatory at the time the original clause was entered into. Now, if, on the other hand, they did not do that but, in this particular case, decided to vary from the terms of the national contract, as has been testified Mr. Yablonski said, and it was said several times, if that evidence is true, then the United Mine Workers are not using this contract as an instrument to impose the terms on a small company like Solar so as to help out the large competitors, which is what the Supreme Court is obviously worried about.

We all know that a union has a right to bargain and to use its best efforts to secure better wages and working conditions for its members. That is what it is for, and it is protected in this right under the law and, as long as it is doing that on its own, we have no criticism of it, but, yet, on the other hand, if part of the agreement with the coal operators is to force higher wages and difficult working conditions on the smaller operators, which they can't meet, and the union is engaged in that and was doing that in this very situation with Solar Fuel, using this contract for that, purpose, then you are permitted to find a violation of the antitrust laws.

I don't know whether I have clarified it or not, but I think that is the best I can do. It wouldn't help any to read this whole Supreme Court decision, which covers many pages and, of course, as usual, has various judges who have various reasons and dissents and so forth. I have given you the sum total of it. I think that is the best I can do.

I have said in my charge that this matter has caused great difficulty to the Court; it has caused difficulty, as you can see, to the United States Supreme Court on how to handle it, but the United States Supreme Court will not permit a union to agree with a group of employers that they are going to use the wages set forth in the national contract for the purpose of driving small competitors out of business. Beyond that, I don't think I can do anything to help you. It is a factual question in this case whether the union did do anything like that, and you have testimony which is diametrically opposed, and you have to resolve that conflict. That is what jurors are for (R. 1125a-1129a).

(In Open Court)

THE FOREMAN: We have sat here three times listening to your charge again, and we are confused as to that paragraph of the charge, as to whether we are able to use that in this particular case, as to the Supreme Court's decision on it. We don't—we are not sure whether we can use it, if it pertains to a conspiracy or does it pertain to an antitrust law? Can we use that paragraph? This is the thing.

THE COURT: Yes. You should consider it.

THE FOREMAN: We can consider that paragraph?

THE COURT: Yes. In the light of the actions, the demands made by the union, if those demands were made, if they said they couldn't veer from this agreement.

JUROR No. 4: It is not illegal, by itself, unless there is corroborating evidence they used it for that?

THE COURT: If they used it in this case against Solar Fuel. If they said, in the beginning, we will negotiate on any terms you want, then they have not used that agreement as an instrument to violate the antitrust law, and you cannot find such violation. If they did use it in this case, then you would be justified in making such a finding (R. 1130a-1131a).

MR. METZ: I would like to put on the record, from the Stipulation as to Factual Matters not in Dispute certain portions (R. 42a).

"Ten: On July 17, 1967, the union, United Mine Workers of America, instituted a strike against Solar Fuel Company, which was current at the time of the hearing on decertification in October of 1968 and at the time of the decertification election in February of 1969.

"Eleven: From the night of July 17, 1967, until the time of the decertification election in February of 1969, corporate plaintiff's mines numbers 3 and 4 were picketed by the United Mine Workers of America and the United Mine Workers of America, District No. 2, through pickets, some of whom were employees of the corporate plaintiff, others were employees, organizers, officers, members or agents of defendants, and others were employees of various surrounding mine operators (R. 43a).

"Fourteen: During a period from July 17, 1967, the defendants, through their organizers, officers, agents, members and/or employees, attempted to cause the plaintiff, Solar Fuel Company, to enter into a contract with the defendants in the same form as the National Bituminous Coal Wage Agreement of 1950, as amended (R. 44a).

(Plaintiffs' No. 208 marked for identification.)

MR. METZ: As I previously started to say, in connection with the stipulation, paragraph 14, which I have already read into evidence, we offer in evidence, as Plaintiffs' Exhibit No. 208, a copy of National Bituminous Coal Wage Agreement of 1950, as it was in effect during the period July 17, 1967, through December 6, 1968.

MR. LIVINGSTON: There is no objection, Your Honor (R. 46a).

(Plaintiffs' Exhibit No. 209 was marked for identification.)

MR. METZ: In connection with the same paragraph 14 of the stipulation, we offer in evidence, as Plaintiffs' No. 209, a copy of the National Bituminous Coal Wage Agreement of 1950, as Amended effected October 1, 1968.

MR. LIVINGSTON: There is no objection, Your Honor.

THE COURT: It may be admitted (R. 47a).

A. (Reading) "Dear Mr. Cascio: As per our telephone conversation of this date, enclosed you will find original and copy of my summarization of the agreement between the United Mine Workers and the Coal Operators, under agreement of 1950, as amended April 1, 1966."

Q. All right. In other words, he sent you an original and copy of his summarization of the terms of the national contract between the United Mine Workers and the Coal Operators. A. Yes.

Q. Now, prior to that time, had you received from anybody a copy of that national coal wage contract of 1950, as amended? A. Yes. The meeting I have alluded to, held on September the 18th, 1968—'67, it was—Mr. Yablonski, Mr. DeGretto, and the others were present. I believe this could be considered a bargaining session. At that time, there had been presented to the company the national contract.

Q. May I see that, the exhibit? I show you Exhibit 208. Can you identify that as anything? A. Yes. That is a National Bituminous Coal Wage Agreement of 1950. This was the contract that was presented to us—to the company at the meeting to which I have made reference.

Q. And that includes—what is the last amendment included in that exhibit? A. There are various amendments.

Q. The very last one. A. As amended, effective April 1, 1966.

Q. And is that the same reference which appears in Mr. Creany's letter to you? A. Yes.

Q. He says he is sending you a copy of—original and copy of his summarization of the agreement between the United Mine Workers and Coal Operators under agreement of 1950, as amended April 1, 1966? A. Yes.

Q. So Exhibit 208 is that? A. Yes.

Q. Now, during the entire course of your negotiations with the United Mine Workers, beginning on September 18, '67, what you say is the first bargaining session, and continuing down into 1968, can you tell us what the basic position of the union negotiators was, with reference to this national wage contract, National Coal Agreement of 1950, as amended April 1, '66? A. Yes. The position that had been taken repeatedly throughout the negotiations, sometimes by a direct statement but other times by going through the contract piecemeal, bit by bit, was that they would not alter any phase of that contract.

Q. And by "that contract," you mean this— A. The national contract referred to in Mr. Creany's letter; yes.

Q. Which is Exhibit 208? A. Yes. (R 625a-627a).

Q. I show you what has been received into evidence as Plaintiff's Exhibit 209, marked the National Bituminous Coal Wage Agreement of 1968, effective October 1, 1968. I ask you whether, at that meeting of December 6, 1968, any reference was made to that amendment which had taken effect October 1, 1968. A. A reference had been made to that amendment. Copies of this agreement had been made available to us previously.

Q. A copy of this amendment? A. A copy of this amendment, and then reference had been made, at the last previous session, to this amendment.

Q. What was the date of that? A. October 24.

Q. October 24, '68? A. Yes.

Q. Go on. A. In the reference—in the meeting of December 6, 1968, a comment was made by Mr. DeGretto, as I recall, and as indicated in the notes, that now there were changes made in the contract that would permit some latitude in bargaining out on some points.

Q. A change was made in what agreement? A. In the 1968 agreement.

By Mr. Metz:

Q. Will you repeat, please, your best recollection as—either as refreshed by that memorandum or otherwise—exactly what Mr. DeGretto said at that session, December 6, 1968? A. In essence, what was said, because of the new language in the new agreement, it allowed the negotiators of the union to negotiate a contract different from that of the national contract. That is, in essence—

Q. And by the new agreement, you mean what—you are touching the amendment of October 1, '68, Exhibit 209? A. Yes, sir. (R. 632a-635a)